Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1994

NICHOLAS E. TAVAGLIONE,

Respondent,

v.

MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT, J. RICHARD SWARTZ, ROY E. WHITEHEAD, and RIVERSIDE NATIONAL BANK,

Petitioners.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

HAIGHT, BROWN & BONESTEEL,
Roy G. Weatherup,* and
Rita Gunasekaran
1620 26th Street, Suite 4000 North
Post Office Box 680
Santa Monica, California 90406-0608
Telephone: (310) 449-6000

Attorneys for Petitioners,
MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT,
J. RICHARD SWARTZ, ROY E. WHITEHEAD,
and RIVERSIDE NATIONAL BANK

*** Counsel of Record**

Westside Law Publishers • West Hollywood, CA 90069 • (310) 273-2887

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QUESTIONS PRESENTED

1. May a state court, consistent with the constitutional requirement of notice, affirm a massive judgment against a federally chartered bank on the basis of an "implied" or "oral" contract to make or renew loans, where no such cause of action was ever pleaded or submitted to the jury?

2. Where a federal statute prohibits a federally chartered bank from loaning money to a borrower who is not credit worthy, may a state require the bank to make such a loan, on pain of civil liability?

LIST OF PARTIES TO THIS PROCEEDING

The only parties to this proceeding are the petitioners, Michael C. Billings, Maryann Archambault, J. Richard Swartz, Roy E. Whitehead, and Riverside National Bank, the defendants in the state courts, and respondent Nicholas E. Tavaglione, the plaintiff below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES TO THIS PROCEEDING ii

TABLE OF AUTHORITIES CITED v

THE OPINIONS RENDERED BY THE CALIFORNIA REVIEWING COURTS 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

1. The Constitutional and Statutory Bases for This Petition for Certiorari. 3

2. The Operative Pleadings. 5

3. The Overruling of the Demurrer and the Answer Filed by the Defendants. 6

4. The Poor Excuse for a Trial. 7

5. The Jury Verdict and the Judgment. 7

6. The First Erroneous Decision Filed by the Court of Appeal. 8

7. The California Supreme Court's Decision Upon Review, and the Remand of the Case to the Court of Appeal. 9

8. The Court of Appeal's Second Erroneous Decision Which Violates the Defendants' Constitutionally Protected Right to Notice, and Conflicts With Federal Law. 9

9. The Denial of the Petition for Rehearing. 10

10. The California Supreme Court's Denial of the Petition for Review. 11

ARGUMENT 13

I.

Upon Reversal and Remand of the Case by the California Supreme Court, the Court of Appeal Has Once Again Affirmed the Erroneous Judgment by Conjuring Up a Legally Untenable "Implied" or "Oral" Contract to Make or Renew Loans, Ignoring the Total Absence of Such a Contract in the Record, and Has Thereby Trampled the Defendants' Constitutionally Protected Right to Notice of Claims Against Them. 13

II.

Barring Intervention by This Court, the Defendant Bank Will Be Severely Penalized for Acting Prudently and in Conformity With Federal Laws Prohibiting the Unsound Banking Practice of Making Loans to Uncredit worthy Borrowers. 21

III.

Conclusion. 27

TABLE OF AUTHORITIES CITED

Cases	Page(s)
Bouie v. City of Columbia, 378 U.S. 347 (1964)	17
Bullion v. Federal Deposit Insurance Corporation, 881 F.2d 1368 (5th Cir. 1989)	24
Careau & Company v. Security Pacific Credit, Inc., 222 Cal.App.3d 1371, 272 Cal.Rptr. 387	20
Conley v. Gibson, 355 U.S. 41 (1957)	18
Covey v. Town of Somers, 351 U.S. 141 (1956)	17
First National Bank of Bellaire v. Comptroller of the Currency, 697 F.2d 674 (5th Cir. 1983)	23
First National Bank of Eden v. Department of the Treasury, 568 F.2d 610 (8th Cir. 1978)	23
Groos National Bank v. Comptroller of Currency, 573 F.2d 889 (5th Cir. 1978)	16
Henderson v. Harnishfeger Corporation, 12 Cal. 3d 663 (1974)	26
International Paper Company v. Ouellette, 479 U.S. 481, 107 S.Ct. 805 (1987)	25
Lambert v. People of the State of California, 355 U.S. 225 (1957)	16
Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306 (1950)	17, 18
New Motor Vehicle Board of the State of California v. Orrin W. Fox Company, 439 U.S. 96 (1978)	17-18
Northwest National Bank, Fayetteville, Arkansas v. U.S., 917 F.2d 1111 (8th Cir. 1990)	23

Peterson Development Company v. Torrey Pines Bank,
233 Cal.App.3d 103, 284 Cal.Rptr. 367 (1991)
review denied (1991) 20
Russell v. United States,
369 U.S. 749 (1962) 17
Stirone v. United States,
361 U.S. 212 (1960) 17
Tavaglione v. Billings,
4 Cal.4th 1150, 17 Cal.Rptr.2d 608,
847 P.2d 574 (1993) 2
United States v. James Daniel Good Real Property,
___ U.S. ___, 114 S.Ct. 492 (1993) 18
Walker v. City of Hutchinson,
352 U.S. 112 (1956) 16

Constitutions

United States Constitution
Article VI, clause 2 25

Rules

Rules of the Supreme Court of the United States
rule 14(h) 11

Statutes

California Civil Code
section 2881(1) 11

California Code of Civil Procedure
section 801-811 8

C.F.R.
section 215.4(a) 2, 24
section 215.4(a)(1) 22
section 215.4(a)(2) 22
section 215.4(c) 2, 24

California Evidence Code
section 452 11
section 453 11
section 459 11

Federal Reserve Act
section 22(h) 24

12 U.S.C.
section 1 4
section 375a 24
section 375a(2) 23
section 375b 2, 21, 24
section 375b(3) 4, 6, 21
section 1818 . . . . . 11, 12, 22
section 1818(a)(2) 2, 5

28 U.S.C.
section 1257 2

Other Authorities

Black's Law Dictionary, Sixth Edition, West Publishing Company (1990) 3

49 *A.L.R.3d* 727 21

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Petitioners.

PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners, Michael C. Billings, Maryann Archambault, J. Richard Swartz, Roy E. Whitehead, and Riverside National Bank, respectfully pray that a writ of certiorari be issued to review the decision rendered by the Court of Appeal of the State of California, Fourth Appellate District, Division Two. The Supreme Court of California has denied review. The issues presented include litigants' due process right to notice of claims against them before liability may be imposed by a court of law, and the preemption of a state court ruling which directly conflicts with a federal statute.

THE OPINIONS RENDERED BY THE CALIFORNIA REVIEWING COURTS

On November 17, 1993, the California Court of Appeal affirmed the judgment entered below. The court's opinion is Appendix A to this petition. This decision by the Court of Appeal was rendered upon reversal of its prior decision, and remand of the case to it by the California Supreme Court. *Tavaglione v. Billings*, 4 Cal.4th 1150, 17 Cal.Rptr.2d 608, 847 P.2d 574 (1993). [Appendix B.] The Supreme Court had granted review pursuant to the petition filed by the defendants after the first opinion filed by the California Court of Appeal on June 15, 1992. [Appendix C.]

JURISDICTION

The California Court of Appeal filed its opinion on November 17, 1993. It denied rehearing on December 10, 1993. [Appendix E.]

The defendants' request for review by the California Supreme Court was denied on March 3, 1994. [Appendix D.] On that date, the judgment of the trial court (Appendix F) became final as to the State of California.

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 *U.S.C.* section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the Fourteenth Amendment to the Constitution of the United States. The relevant portion of this amendment is set forth in Appendix N. The case also involves 12 *U.S.C.* sections 375b and 1818(a)(2) [Appendix M and N], and 12 *C.F.R.* section 215.4(a) and (c). [Appendix O.]

STATEMENT OF THE CASE

1. The Constitutional and Statutory Bases for This Petition for Certiorari.

The second and most recent decision by the California Court of Appeal of the Fourth Appellate District, Division Two, violates the defendants' Fourteenth Amendment due process right to notice of claims against them, and flouts federal statutes prohibiting loans to a deadbeat[1] borrower. The Court of Appeal's decision, which is legally unsustainable, was obviously dictated by the court's determination to reach the same conclusion it had reached prior to remand of the case to it upon review by the California Supreme Court.

Although the court finally recognizes that the plaintiff has no private right to damages for his alleged "illegal ouster" from his position as a director of the Bank, the central claim on which the plaintiff's entire lawsuit is based, it nevertheless affirms. It does so by creating out of thin air an absolute duty on the part of the Bank to renew the plaintiff's overdue loans, purportedly pursuant to an "implied" or "oral" contract.

The Court of Appeal holds that the Bank's refusal to renew the plaintiff's overdue loans constitutes a breach of contract to renew those loans. [Appendix A:39-48.] However, the plaintiff neither pleaded, nor attempted to prove at trial, either the existence of a contract to renew a loan or its breach by the Bank. Accordingly, the Court of Appeal does not, and cannot, point to evidence of an objectively verifiable contract in the pleadings. The court summarily disregards the pleading defect, stating that the plaintiff's "allegation regarding the 'loan

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[1] The word "deadbeat" is defined in *Black's Law Dictionary*, Sixth Edition, West Publishing Company (1990), as "one who fails to pay his debts."

transactions,' although cursory and conclusionary (sic), nevertheless adequately alleges the requisite underlying contract between plaintiff and defendants." [Appendix A:41.]

Not only does the record contain no evidence of any such contract, but it contains ample evidence to the contrary. Each of the loan agreements signed by the plaintiff with the Bank contains a specific provision permitting the Bank to demand immediate repayment of the entire loan in the event of plaintiff's default. [See, for example, 10 J.A. 2666, 2669, 2673, 2681, 2684, 2717.][2]

The lack of evidence at trial, of any contract between the parties to renew a loan, is dealt with equally cavalierly by the court. It concludes that evidence of prior renewals of the plaintiff's loans by the Bank "is sufficient to establish either an oral agreement or an agreement implied from Billings' conduct that defendants, at the very least, would not refuse unreasonably to renew or extend plaintiff's outstanding loans while plaintiff's cash flow problem persisted and so long as plaintiff was current on the interest payments." [Appendix A:42-43.] Such an imposition of liability by a reviewing court, without notice and an opportunity to defend, constitutes a clear violation of the Fourteenth Amendment of the Constitution, and merits intervention by this court.

The decision by the Court of Appeal also conflicts directly with governing federal statutes. Since the Bank is federally chartered, it is governed by the *National Bank Act*, 12 *U.S.C.* section 1 *et seq.* [Appendix H:2, 5.] 12 *U.S.C.* section 375b(3) prohibits loans to bank "insiders" who are less credit worthy than, or on terms not available to, other borrowers. 12 *U.S.C.* section 1818(a)(2) prohibits loans to borrowers

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[2] "J.A." refers to Joint Appendix and "R.T." refers to Reporter's Transcript. The designation is preceded by the volume number, and is followed by the page number.

who are not credit worthy on pain of loss of the Bank's insured status. However, in its blind determination to affirm, the court creates an absolute duty on the Bank's part to renew the plaintiff's loans, regardless of his credit worthiness.

The plaintiff admitted in his operative pleading that, at the pertinent time, he was over 30 days in default on his several loans from the Bank. [Appendix H:4.] The record supports this admission. [11 J.A. 1355; 11 R.T. 2307-2318.] The evidence is also undisputed that the Bank was aware of the severe cash flow problems encountered by the plaintiff at that time. [8 R.T. 1593.]

It is under these circumstances that the Bank prudently refused to renew the plaintiffs' several loans on which he was already in default for over 30 days. Nonetheless, the California Court of Appeal has seen fit to impose a crushing liability on the Bank by creating an absolute duty to renew the plaintiff's overdue loans regardless of his credit worthiness. Such a duty is unheard of in common law and contrary to the governing federal statute. The decision by the Court of Appeal directly conflicts with federal law enacted to protect financial institutions and their depositions, is preempted, and must not be tolerated by this court.

2. The Operative Pleadings.

On May 11, 1987, the plaintiff sued Riverside National Bank, its president, Mr. Michael C. Billings, its chairman of the board of directors, Mrs. Dolores Magnuson, and its other directors, Mrs. Maryann Archambault, Mr. Leon Sigerman, Mr. J. Richard Swartz, and Mr. Roy E. Whitehead.[3] [Appendix H:2.] In the operative first amended complaint, the plaintiff asserted seven causes of action, including "illegal ouster" of

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[3] Mrs. Magnuson and Mr. Sigerman are not parties to this appeal.

plaintiff as a director, defamation, wrongful disclosure of confidential information, breach of the implied covenant of good faith and fair dealing, interference with contractual relationships, interference with contractual relations and prospective advantage, and negligent interference with contractual relationships. [Appendix H:2-19.]

In the fourth cause of action, for breach of the implied covenant of good faith and fair dealing, the plaintiff claimed that the defendants had breached the covenant by improperly removing him as a director of the corporation; by failing to give him an opportunity to cure his loan defaults, prior to adoption of the bylaw; by utilizing his illegal ouster from the board as a pretense for subsequently publishing confidential and private information concerning his loan accounts and defaults; and by formulating and implementing a plan to force him into selling his shareholdings in the Bank. [Appendix H:12-14.] In this entire cause of action, there was absolutely no mention of any contract between the plaintiff and the Bank, much less one whereby the Bank unequivocally agreed to renew the plaintiff's loans, regardless of his credit worthiness. [Appendix H:12-14.]

3. The Overruling of the Demurrer and the Answer Filed by the Defendants.

The defendants demurred to the plaintiff's first amended complaint. [Appendix I.] In demurring to the plaintiff's fourth cause of action for breach of the implied covenant of good faith and fair dealing, the defendants contended that it was impossible to determine the source of the duty of good faith alleged by the plaintiff to be owed to him, since no contract was alleged, and no statutory basis for a good faith duty was set forth by him.

However, the trial court overruled the defendants' demurrer [Appendix J] and the defendants filed an answer to the complaint. [Appendix K.]

4. The Poor Excuse for a Trial.

The trial court ignored the fundamental problem that plaintiff's entire suit rests upon the supposed violation of his supposed right to remain in office as a director of the Bank, a primary right that does not exist. Moreover, there is no wrongful act or omission alleged that is not related to the plaintiff's removal as a director, and there is no item of damages claimed to have been caused by separate or independent conduct. The trial court refused to accept this plain fact, and permitted a legally meritless suit to go to the jury. There was also no mention throughout the trial of the existence of any type of contract between the Bank and the plaintiff to renew his loans automatically, regardless of whether or not he was in default, and without taking into consideration his credit worthiness at the time the loans became due.

5. The Jury Verdict and the Judgment.

In the judgment entered pursuant to the jury verdict, the court awarded the plaintiff $2,254,787.00 in compensatory damages and $2,300,000.00 in punitive damages against the Bank; $2,254,787.00 in compensatory damages and $130,000.00 in punitive damages against Mr. Michael Billings; and $1 each from Mr. J. Richard Swartz, Ms. Maryann Archambault, and Mr. Roy E. Whitehead. [Appendix F].

6. The First Erroneous Decision Filed by the Court of Appeal.

The defendants appealed from the judgment entered against them, raising 22 distinct issues on appeal[4] including their central defense that plaintiff's removal from his fiduciary position as director of the Bank simply could not entitle him to a private suit for damages.

Interestingly, in its first opinion, the Court of Appeal recognized that the "plaintiff's complaint . . . did not allege separate causes of action which would independently support separate damage awards but instead alleged one cause of action, framed in separate counts, asserting various theories of recovery based upon the same operative facts." [Appendix C:16.] Nevertheless, the court did not stop to consider whether plaintiff's central claim for wrongful ouster was legally sustainable. Instead, relying on the general verdict rule, and ignoring the numerous instructional and evidentiary errors pointed out by the defendants, the court affirmed the erroneous judgment entered below.

Candidly acknowledging its inability "to comprehend the function or import of the special interrogatories regarding damages," (Appendix C:16) the court affirmed the entire $2.25 million judgment ignoring the jury's finding that the plaintiff had incurred only $604,787.00 in compensatory damages from defendants' defamation.

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[4] Included among them was the threshold issue of the trial court's jurisdiction since, under California law, the director of a bank questioning his removal from the board by the enactment of a bylaw, is required to proceed solely by an action in the nature of *quo warranto*. California *Code of Civil Procedure* sections 801-811.

7. The California Supreme Court's Decision Upon Review, and the Remand of the Case to the Court of Appeal.

The California Supreme Court granted the defendants' petition for review of the Court of Appeal's erroneous decision expressly stating: "We disagree with the Court of Appeal's analysis." [Appendix B:10.] It found the "Court of Appeal's statement that the damage interrogatories were 'meaningless and irrelevant' . . . *puzzling*." [Appendix B:10.] It held that the Court of Appeal's limited review of issues relating to the defamation claim could not sustain the entire $2.25 million judgment, and reversed and remanded. [Appendix B:10.]

8. The Court of Appeal's Second Erroneous Decision Which Violates the Defendants' Constitutionally Protected Right to Notice, and Conflicts With Federal Law.

The second decision filed by the Court of Appeal is even more grievously flawed than the first. [Appendix A.] Determined to affirm the erroneous judgment, the court stubbornly states: "While we share defendants' view that plaintiff's first purported cause of action for damages based on defendants' 'illegal ouster' or removal of plaintiff from the RNB board of directors does not, as a matter of law, state a theory of recovery which supports an award of damages, we shall not address that issue, or any of the defendants' other challenges to that cause of action. Even if we were to conclude plaintiff's recovery under the first cause of action was, for some reason, invalid, that conclusion would not require reversal of the entire judgment in view of the jury's liability and damage findings in connection with plaintiff's other theories of recovery." [Appendix A:16.]

Reasoning thus, the Court of Appeal chooses to address only the defamation and breach of the implied covenant of good faith and fair dealing causes of action. The Court of Appeal fails to grasp the interrelationship between the invalid "illegal ouster" cause of action, and the two causes of action which the court finds sufficient to support the judgment against the defendants.

Once it is acknowledged that there can be no private cause of action for the alleged "illegal ouster" of a bank director, the viability of plaintiff's suit against the Bank is dependent upon a legally untenable duty to make loans to the plaintiff. Since there can be no such legal duty, the Court of Appeal has attempted to create one. The court announces that the plaintiff's "allegation regarding the 'loan transactions,' although cursory and conclusionary (sic), nevertheless adequately alleges the requisite underlying contract between plaintiff and defendants." [Appendix A:41.] It then rules that the evidence was "sufficient to establish either an oral agreement or an agreement implied from Billings's conduct that defendants, at the very least, would not refuse unreasonably to renew or extend plaintiff's outstanding loans while plaintiff's cash flow problem persisted and so long as plaintiff was current on the interest payments." [Appendix A:42-43.]

9. The Denial of the Petition for Rehearing.

The defendants filed a petition for rehearing on December 2, 1993. [Appendix G.] The defendants contended that, in apparent recognition of the fact that the plaintiff's entire case depends upon the Bank's supposed duty to make loans to the plaintiff, the court has attempted to create such a duty, because no such legal duty exists. However, since there is not even a suggestion of a breach of contract action in the record, and federal law prohibits loans to borrowers who are not credit worthy, the court's creation of an absolute duty to

renew the plaintiff's loans violates the defendants' constitutionally protected due process right to notice embodied in the Fourteenth Amendment and conflicts with federal statutes, such as 12 *U.S.C.* section 1818, prohibiting loans to borrowers who are not credit worthy.[5] [Appendix G:2-5.] In compliance with rule 14(h) of the *Rules of the Supreme Court of the United States*, it is pointed out that it was in this manner that the defendants raised the constitutional issue of notice, as well as the conflict created by the Court of Appeal decision with governing federal statutes. The Court of Appeal denied the defendants' petition for rehearing on December 10, 1993. [Appendix E.]

10. The California Supreme Court's Denial of the Petition for Review.

Upon denial of the petition for rehearing by the California Court of Appeal, the defendants sought review from the California Supreme Court. The defendants stated that the

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[5] The superior court file in this action contains ample evidence of plaintiff's lack of credit worthiness, which continues to this day. The entire judgment awarded in plaintiff's favor totals $6,939,577.00. However, in keeping with his tendency to borrow far more than he can possibly repay, the plaintiff has given eight voluntary liens against the judgment in his favor, in a total amount of $9,538,507.55. The largest of the lienholders is Chemical Bank, successor by merger to Manufacturers Hanover Trust Company, which has a lien in the amount of $5,896,814.36. In conflict with the prior liens, on March 11, 1994, the plaintiff also assigned to his attorneys 35 percent of all of the proceeds of the judgments, including the interest on those amounts, as well as a November 1, 1990, promissory note for $86,500.00 and the interest accrued thereon. Since the plaintiff has signed all of the liens, it appears that they are voluntary contractual liens within the meaning of California *Civil Code* section 2881(1), rather than liens created by operation of law. The liens are, of course, subject to judicial notice pursuant to California *Evidence Code* sections 452, 453, and 459. Unfortunately, despite the defendants' request, the Court of Appeal refused to take judicial notice of the liens.

Court of Appeal, which finally recognized the invalidity of the plaintiff's "wrongful ouster" claim, invented a whole new theory, breach of contract to make a loan, to once again uphold the judgment. The defendants contended that, in the absence of any allegations in the pleadings and any evidence at trial, of breach of an existing contract with the plaintiff by the Bank, the creation of such a duty by the Court of Appeal constituted a clear violation of the defendants' due process right to notice as guaranteed by the Fourteenth Amendment of the United States Constitution. [Appendix L.]

The defendants also contended that, since the plaintiff was an obvious credit risk at the pertinent time, any contract to make a loan by the Bank would violate federal law as embodied in 12 *U.S.C.* section 1818, which prohibits loans to borrowers who are not credit worthy. [Appendix N.] Unfortunately, all these contentions fell on deaf ears, and the defendants' petition for review was denied. [Appendix D.]

ARGUMENT

I.

Upon Reversal and Remand of the Case by the California Supreme Court, the Court of Appeal Has Once Again Affirmed the Erroneous Judgment by Conjuring Up a Legally Untenable "Implied" or "Oral" Contract to Make or Renew Loans, Ignoring the Total Absence of Such a Contract in the Record, and Has Thereby Trampled the Defendants' Constitutionally Protected Right to Notice of Claims Against Them.

The critical issue in this case, both at trial and when the case was on appeal the first time, was the validity of the plaintiff's first cause of action for "illegal ouster" from his position as a director of the Bank, and pursuant to which he recovered massive damages. While the invalidity of this claim was the primary focus of the defense, it was consistently ignored both by the trial court and by the Court of Appeal.

Upon reversal and remand of the case by the California Supreme Court, which found that there are "substantial issues underlying plaintiff's theory of illegal ouster" [Appendix B:12-13], the Court of Appeal has belatedly recognized that plaintiff's primary cause of action for " 'illegal ouster' . . . does not, as a matter of law, state a theory of recovery which supports an award of damages." [Appendix A:16.]

Once it is acknowledged that plaintiff has no legally tenable cause of action for his alleged "illegal ouster" from the Bank's board, the conclusion is inescapable that the entire lawsuit, which was tried on the premise that the plaintiff stated a valid claim against the Bank for such alleged "illegal ouster," was tainted. The vast body of evidence admitted to support that untenable cause of action, and the numerous jury

instructions given on that issue, were all in error, highly prejudicial, and warrant an immediate reversal. The Court of Appeal, however, refuses to acknowledge the inescapable legal effect of such recognition, and declares:

> "[W]e shall not address that issue, or any of defendants' other challenges to that cause of action." [Appendix A:16.]

As a result of this erroneous conclusion, the Court of Appeal once again upholds the multimillion dollar judgment against the defendants, but does so this time by judicially creating a cause of action which was neither pleaded nor proved at trial. As pleaded, the cause of action for breach of the implied covenant of good faith and fair dealing is based upon the plaintiff's former relationship with the Bank as a stockholder, a director, and a borrower. These three relationships are alleged to create a duty on the part of the Bank and its officers and directors to permit the plaintiff to continue in office as a director. In relation to his position as a borrower, plaintiff's only contentions are that the defendants had a duty to deal "fairly and in good faith" in connection with his loan transactions, and that they failed to give him an opportunity to cure his loan defaults prior to the adoption of the bylaw. [Appendix H:13-14.]

There are absolutely no allegations in the pleadings of the breach of any actual contract between the defendants and the plaintiff, and no such evidence was offered at trial. This fact is implicitly acknowledged by the Court of Appeal, which relies on prior renewals of the plaintiff's loans by the Bank, and states:

> "That evidence, in our view, is sufficient to establish either an oral agreement or an agreement implied from Billings' conduct that defendants, at the very least, would not refuse unreasonably to renew or extend plaintiff's

> outstanding loans while plaintiff's cash flow problem persisted and so long as plaintiff was current on the interest payments. In other words, there was evidence of an established course of conduct or implied contract between plaintiff and defendants which created a duty on the part of the defendants to act in good faith and deal fairly with plaintiff in connection with renewing plaintiff's loans." [Appendix A:42-43.]

In effect, the Court of Appeal has created a fictional, legally untenable, contract to make a contract, whereby it imposes an absolute duty on the Bank to renew the plaintiff's loans, regardless of whether or not he was current on his loan repayments, and without any consideration as to his credit worthiness at the time the loans were to be renewed. Thus, the defendants never had any notice of an obligation to respond to such a cause of action, even if such a cause of action were legally recognized in California, which it is not.

Contrary to the Court of Appeal's finding of an "implied" or "oral" contract to renew the plaintiff's loans, each of the loan agreements signed by the plaintiff with the Bank contains a specific provision permitting the Bank to demand immediate repayment of the entire loan, in the event of a default by the plaintiff. The pertinent portion of the agreements reads:

> "If Borrower does not pay as agreed, or if Borrower or any guarantor of this note breaches any other agreement with the Bank, Borrower will be in default. Upon default, the Bank may declare the entire unpaid principal and accrued interest immediately due, without notice, and Borrower will then pay that amount." [See, for

> example, J.A. 10, 2666, 2669, 2673, 2681, 2684, 2717.]

As recognized in *Groos National Bank v. Comptroller of Currency*, 573 F.2d 889 (5th Cir. 1978), no person can claim a constitutionally protected right to do business with a particular bank. A bank's right to decline or terminate a deposit relationship is well established at common law. 573 F.2d at 897. Consequently, under settled legal principles, there can be no "implied" contract between a bank and its customer to renew the customer's loans regardless of his credit worthiness at the time he seeks to borrow money. Furthermore, even if there is evidence that could support a breach of contract theory, which defendants deny, the present Court of Appeal opinion is improper. For, if the defendants are subject to liability for breach of contract, they had a constitutional right to notice of the claim.

A classic statement of the constitutional right to notice can be found in *Lambert v. People of the State of California*, 355 U.S. 225 (1957). In *Lambert*, this Court declared that:

> "Ingrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed." 355 U.S. at 228.

This Court also observed that the requirement of notice applies to both civil and criminal cases. 355 U.S. at 228.

To be constitutionally sufficient, adequate notice must be given of legal proceedings, which must be reasonably calculated to inform parties of those proceedings which may directly and adversely affect their legally protected interests. *Walker v. City of Hutchinson*, 352 U.S. 112, 115-116 (1956).

See also, *Covey v. Town of Somers*, 351 U.S. 141 (1956). The requirement of notice includes fair warning of what the law prohibits. *Bouie v. City of Columbia*, 378 U.S. 347 (1964). In addition, the particular conduct said to violate the law must be specified. *Stirone v. United States*, 361 U.S. 212 (1960); *Russell v. United States*, 369 U.S. 749 (1962).

In *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950), this Court overturned a state court decree settling accounts by the trustee of a common trust fund, on the ground that the notice given under state law was insufficient to satisfy the requirements of the Fourteenth Amendment. It was observed that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." 339 U.S. at 313.

In *Mullane*, the court emphasized that the requirement of notice is not simply notice of the pendency of legal proceedings. Rather, the notice must be sufficiently specific that the party receiving it is able to act in the protection of that party's interests. For example, in *Mullane*, the notice given of a probate hearing was deemed constitutionally defective, because it did not refer to the right of the beneficiaries to have a trustee answer for negligence, and it did not advise the beneficiaries that their recoveries might be diminished by attorney's fees that could be challenged. 339 U.S. at 313.

As noted above, the requirement of notice applies equally in civil and criminal cases. The civil equivalent of a criminal indictment is a complaint. Although this Court "has endorsed the modern relaxation of pleading rules, it has never receded from the requirement that civil complaints provide parties defendant with 'fair notice' of the claims against them." *New Motor Vehicle Board of the State of California v. Orrin*

W. Fox Company, 439 U.S. 96, 125, *fn.* 29 (1978) (Dissenting opinion of Justice John Paul Stevens, citing the unanimous opinion of the court in *Conley v. Gibson*, 355 U.S. 41 (1957)).

The principle that notice is an essential part of the concept of due process of law was recently reaffirmed in *United States v. James Daniel Good Real Property*, ___ U.S. ___, 114 S.Ct. 492 (1993). It was held in that case that the government, in a civil forfeiture case, may not seize real property "without first affording the owner notice and an opportunity to be heard." ___ U.S. at ____, 114 S.Ct. at 497. Citing the seminal case of *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950), and other authorities, the majority observed that "[o]ur precedents establish the general rule that individuals must receive notice and an opportunity to be heard" before they are deprived of property. ___ U.S. at ___, 114 S.Ct. at 4978. In fact, "[t]he right to prior notice and a hearing is central to the Constitution's command of due process." ____ U.S. at _____, 114 S.Ct. at 500.

This constitutionally protected right to notice was violated in this case by the Court of Appeal. Before the defendants can be held liable for breach of a contract, they should have been given notice of such a claim, but they were not. With notice, the defendants could have presented evidence to show the invalidity of the theory. Certainly, the defendants have a constitutional right to defend themselves against any claim of breach of contract. However, they were never given the opportunity to do so.

The Court of Appeal has now upheld a multimillion dollar judgment, relying on an unpleaded cause of action, which was also not proved at trial. Consequently, the defendants had no notice of this supposed "oral" or "implied" contract to renew a loan which they allegedly breached. The defendants' constitutional right to notice of the applicable law

and notice of the factual nature of the conduct charged has been violated. This unconscionable violation of the defendants' inalienable right should not be tolerated by this court. This court should intervene, uphold the rule of law, and protect the defendants' constitutionally guaranteed right to notice, since the California reviewing courts failed to do so.

The focus of the entire trial, and of the first appeal, was plaintiff's "illegal ouster" claim. The plaintiff's operative complaint shows the close interrelationship of the various causes of action, all of which flow from the invalid claim of "illegal ouster." Indeed, all of the allegations of the first cause of action, "illegal ouster," are incorporated into each remaining cause of action. In their appellants' opening brief, the defendants pointed out that all the other causes of action alleged by the plaintiff flowed from his central allegation of "illegal ouster." [Appellants' opening brief at page 50.] In his brief on the merits, the plaintiff acknowledged that he has one cause of action based on a set of operative facts, which is framed in separate counts, asserting various theories of recovery. [Plaintiff's brief on the merits at page 3.] Therefore, by recognizing the invalidity of the "illegal ouster" claim, the Court of Appeal has undermined all of the subsidiary claims. Inexplicably, the Court of Appeal fails to grasp the interrelationship between this invalid cause of action and the two causes of action which it finds sufficient to support the judgment.

The defamation claim rests upon the contention that the plaintiff was not, in fact, validly removed from the board of directors of Riverside National Bank, contrary to what was reported in the press. If the removal of the plaintiff from the board of directors of the Riverside National Bank was not actionable, then it was not defamatory to report the removal. Therefore, now that the Court of Appeal has held, as a matter of law, that plaintiff's "illegal ouster" cause of action does not

state a theory of recovery which supports an award of damages, the defamation claim also cannot stand.

Similarly, if there was never any duty to renew or make loans to the plaintiff, and the record shows that he was undoubtedly in default on his loans, there was nothing defamatory in reporting this fact to the news media. Also, if there is no legally cognizable claim for ousting a delinquent director, then no covenant of good faith and fair dealing arises with respect to the status of the plaintiff as a director. Also, as seen previously, there can be no legally tenable contract to enter into a future loan agreement between the Bank and the plaintiff. In the absence of a contract there can, of course, be no breach of the covenant of good faith and fair dealing. *Peterson Development Company v. Torrey Pines Bank*, 233 Cal.App.3d 103, 116, 284 Cal.Rptr. 367, 375 (1991) *review denied* (1991); *Careau & Company v. Security Pacific Credit, Inc.*, 222 Cal.App.3d 1371, 1393, 1401, 272 Cal.Rptr. 387.

In the present case, the defamation claim was in no way independent of the claim for breach of the covenant of good faith and fair dealing (failure to renew a loan) and the baseless cause of action for "wrongful ouster." Only if there was a duty to renew the plaintiff's loans could it be said that the newspaper coverage of the plaintiff was factually incorrect. Again, only if the bylaw was invalid could plaintiff's "ouster" from his position as the Bank's director be said to have been wrongful, leading to loss of his privacy and damage to his supposedly good reputation.

The Court of Appeal has failed to recognize that all of the causes of action pleaded flow from the plaintiff's removal as a director of the Riverside National Bank. If the removal was not legally wrongful or actionable, then the remaining causes of action are invalid. Moreover, even if the secondary claims were independent in some sense, they were certainly tainted by the lengthy trial on "illegal ouster."

Under these circumstances, the absence of notice of any possible breach of contract claim is particularly prejudicial. There was absolutely no warning to the defendants that they could be held liable pursuant to a breach of contract claim. The Court of Appeal simply created a new cause of action, out of whole cloth, ignoring the fact that it was neither pleaded nor proved at trial. Such a blatant violation of the defendants' constitutionally protected right to notice should not be permitted to remain undisturbed by this court.

II.

Barring Intervention by This Court, the Defendant Bank Will Be Severely Penalized for Acting Prudently and in Conformity With Federal Laws Prohibiting the Unsound Banking Practice of Making Loans to Uncredit worthy Borrowers.

In an effort to stem the tide of the numerous bank failures caused by the overborrowing of bank funds by directors, officers, and other "insiders," Congress has enacted statutes of a regulatory or prohibitory nature, in order to protect the general public who make banks the depositories of their funds. 49 *A.L.R.3d* 727, 731. 12 *U.S.C.* sections 375b and 1818 are examples of such statutes. 12 *U.S.C.* section 375b(3) provides in relevant part:

> "No member bank shall make any loan or extension of credit in any manner to any of its executive officers or directors . . . unless such loan or extension of credit is made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features." [Appendix M.]

The implementing regulation of this statute is 12 *C.F.R.* section 215.4(a)(1) and (2). [Appendix O.]

The plaintiff was an extremely high credit risk at the pertinent time. There is ample evidence in the record that plaintiff was delinquent in his loan repayments to the Bank. As of March 1987, the plaintiff was past due for one quarterly interest payment on his $271,405.14 loan from January 30, 1987; three monthly interest payments, and three and a half months in principal on his $350,000.00 loan; three interest payments on his $63,000.00 loan; and his entire $30,000.00 loan which was due to be paid off in full on January 26, 1987. [11 J.A. 3055; 11 R.T. 2307-2318.]

In fact, in his pleadings, the plaintiff readily admits that, "[a]s of February 3, 1987, plaintiff had loans from the Bank which had been in default for more than 30 days." [1 J.A. 174.] The record supports this admission. [11 J.A. 1355; 11 R.T. 2307-2318.] Not only was the plaintiff in default on his several loans from the Bank, but he was also encountering severe cash flow problems at that time. The evidence is undisputed that the Bank was aware that plaintiff was no longer credit worthy, and posed a severe risk to the Bank's financial stability, as well as to the financial stability of the Bank's other depositors. [8 R.T. 1593.] It is under these circumstances that the Bank refused to renew the plaintiff's overdue loans. However, under the present decision by the California Court of Appeal, the Bank is being penalized for acting in conformity with federal statutes, taking the plaintiff's lack of credit worthiness into account, and not renewing his loans.

The decision by the Court of Appeal also conflicts with 12 *U.S.C.* section 1818, which provides for the termination of a bank's status as an insured depository institution if, among other grounds:

"[T]he Board of Directors determines that -

> "(i) an insured depository institution or the directors or trustees of an insured depository institution have engaged or are engaging in unsafe or unsound practices in conducting the business of the depository institution;
>
> "(ii) an insured depository institution is in an unsafe or unsound condition to continue operations as an insured institution." [Appendix N.]

Unsafe and unsound banking practices are defined as " 'conduct deemed contrary to accepted standards of banking operations which might result in abnormal risk or loss to a banking institution or shareholder.' " *Northwest National Bank, Fayetteville, Arkansas v. U.S.*, 917 F.2d 1111, 1115 (8th Cir. 1990); *First National Bank of Eden v. Department of the Treasury*, 568 F.2d 610, 611, n. 2 (8th Cir. 1978). For the Bank to have renewed the plaintiff's loans, at the pertinent time, would have constituted an "unsafe and unsound banking practice," under this definition.

Under circumstances such as those present here, reviewing courts have held that the issuance of a Cease and Desist Order by the Comptroller of Currency to a bank to be entirely proper. *First National Bank of Bellaire v. Comptroller of the Currency*, 697 F.2d 674 (5th Cir. 1983), is one such case. The bank in that case made a loan to its senior vice president which exceeded the statutory limits set forth in 12 *U.S.C.* section 375a(2). In response, the Comptroller issued a Cease and Desist Order directing the bank to correct the violation and to implement adequate policies and procedures to ensure that similar violations did not occur in the future. The bank sought to have the order set aside since, subsequent to the making of the loan, the statute was amended making the loan lawful. Nevertheless, the Court of Appeals upheld the validity of the order, declaring:

> "There is undoubtedly a direct relationship between compliance with 12 U.S.C. §375a and a bank's soundness. Even though a subsequent amendment to a statute may correct a violation the amendment does not annul the violation which has already occurred. . . . The Comptroller, consequently, was properly acting within his discretion in issuing a Cease and Desist Order requiring the Bank to implement adequate policies and procedures to ensure that 12 U.S.C. §375a is not violated in the future." (Footnotes deleted.) 697 F.2d at 683.

The decision in *Bullion v. Federal Deposit Insurance Corporation*, 881 F.2d 1368 (5th Cir. 1989), is also illustrative. In that case, the chairman and officers of the board of a bank appealed the assessment of civil penalties against them for violation of section 22(h) of the *Federal Reserve Act*, 12 *U.S.C.* section 375b, and its implementing regulations, 12 *C.F.R.* section 215.4(a) and (c). The chairman of the bank had obtained a $1.5 million loan from the bank for the construction and renovation of townhouses owned by a limited partnership of which he was the general partner. Of relevance here is the discussion regarding violation by the bank's officers of 12 *C.F.R.* section 215.4(a), prohibiting the extension of credit to a bank "insider," such as its director. The *Bullion* court interpreted the enabling provision to prohibit both the extension of preferential terms on loans made to bank "insiders," as well as the maki ‚g of loans which involved more than the normal risk of repayment or presented other unfavorable features. 881 F.2d at 1374. The loan made by the bank in that case to its chairman was found to have violated these prohibitions. The court discussed the various considerations which must be taken into account by a bank making such a loan to an "insider," and emphasized that the "availability of cash to pay off the loan should have been one of the primary consid-

erations of the officers in approving the loan." 881 F.2d at 1375.

Under that criterion, the defendant Bank followed the only possible course open to it when it refused to renew the various loans on which the plaintiff was already in default. The Bank is governed by the *National Bank Act*. Consequently, for it to have acted otherwise, and to have renewed the plaintiff's loans, would not only have been fiscally irresponsible, but would also have been violative of the governing statute. However, the present decision by the Court of Appeal fastens liability on the Bank for acting in compliance with the federal statute. This it should not be permitted to do.

Any state law which interferes with, or is contrary to federal law is, of course, invalid. The supremacy clause of the United States Constitution, Article VI, clause 2, provides:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or the laws of any State to the contrary notwithstanding."

In *International Paper Company v. Ouellette*, 479 U.S. 481, 107 S.Ct. 805, 811 (1987), this court recognized that, even where Congress does not speak expressly or impliedly of preemption, state law which actually conflicts with a federal statute or rule is nevertheless preempted to the extent of any conflict. Under that rule, the present Court of Appeal decision which creates a duty on the part of the federally chartered Bank to renew the plaintiff's loans under circumstances which would clearly violate the prohibitions contained in the *National Bank Act* is surely preempted, and should therefore be reversed by this court.

Although no cause of action for breach of contract to make a loan was ever pleaded, certain evidence of the parties' course of conduct with respect to loans made to the plaintiff was received, apparently on the theory that the evidence was relevant to the "wrongful ouster" cause of action. At the conclusion of the trial, even though the plaintiff did not seek to amend his operative pleading, the court gave certain jury instructions which were susceptible to the interpretation that the defendant Bank was obligated to make or renew loans to the plaintiff. The defendants' objections to the jury instructions given are memorialized in the record. [R.T. 15, 3043:21-3044:9; J.A. 6, 1610.] Additionally, these particular instructions were challenged by the defendants in the appellants' opening brief, and it was only natural that the instructions should be attacked as invalid, because the law recognizes no duty to make a loan, and no such legal theory had even been pleaded. [Appellants' opening brief at page 35.]

Instructional error is held to be particularly prejudicial, and to vitiate the general verdict rule, where, as in the instant case, the causes of action are interrelated and dependent upon a central set of facts. *Henderson v. Harnishfeger Corporation* 12 Cal.3d 663, 674 (1974). The entire decision rendered by the Court of Appeal is dependent upon the erroneous premise that the defendant bank had a duty to renew the plaintiff's loans. In the absence of such a duty, and the "implied" contract dreamed up by the Court of Appeal, there is simply no basis in the record for finding a breach of contract by the defendants and thereby subjecting them to liability for the alleged breach of the implied covenant of good faith and fair dealing. Similarly, only if there was a duty to renew the loans, could it be said that the newspaper coverage of the plaintiff was factually incorrect and, hence, defamatory.

It is evident from the record that, at the pertinent time, March 1987, the plaintiff was past due for one quarterly

interest payment on his $271,405.14 loan from January 30, 1987; three monthly interest payments and three and one-half months in principal on his $350,000.00 loan; three interest payments on his $63,000.00 loan, and his entire $30,000.00 loan which was due to be paid off in full on January 26, 1987. [11 J.A. 3055; R.T. 11, 2307-2318.] Under these circumstances, the printing of the factually accurate statement that the plaintiff was in default on his loans, cannot sustain the plaintiff's claim for defamation.

The two causes of action relied upon by the Court of Appeal for affirming the erroneous judgment, as well as all the other causes of action alleged by the plaintiff, cannot be sustained absent this legally untenable and factually nonexistent duty to renew a loan. The creation of such a duty and a consequent imposition of liability on the defendant Bank creates a clear conflict with the governing federal statutes enacted to ensure prudent banking practices such as were followed here. The present decision by the Court of Appeal is not only preempted by federal law, but also violates the public policy reasons which prompted the enactment of such federal law, and should be reversed by this court.

III.

Conclusion.

If there is any substance to the constitutional right to notice before forfeiture of a defendant's property, then relief should be granted to the petitioners in this case, who had no notice either in the pleadings or at trial of the cause of action pursuant to which liability has been imposed on them. Petitioners are being punished for acting prudently and in conformity with federal statutes enacted to protect innocent depositors in federally insured banks. The present Court of Appeal decision directly conflicts with the governing federal statutes, and merits intervention by this Court.

It is respectfully submitted that the Supreme Court of the United States should grant this petition for a writ of certiorari, in order to consider the issues presented. Thereafter, this Court should reverse and nullify the unconstitutional decision of the California Court of Appeal.

Respectfully submitted,

HAIGHT, BROWN & BONESTEEL,
Roy G. Weatherup, and
Rita Gunasekaran

Attorneys for Petitioners,
MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT,
J. RICHARD SWARTZ, ROY E. WHITEHEAD,
and RIVERSIDE NATIONAL BANK

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on April 15, 1994, I served the within *Petition For Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(By Express Mail: Original and 40 Copies)

Clerk, California Court of Appeal
Fourth Appellate District
Division Two
303 West Fifth Street
San Bernardino, California 92401

Clerk of the Superior Court
for the County of Riverside
Honorable John P. Carroll, Judge
County Courthouse
4050 Main Street
Riverside, California 92501

Clerk of the Superior Court
for the County of Riverside
Indio Branch
Honorable H. Morgan Dougherty, Judge
Department C
46-209 Oasis Street
Indio, California 92201

Mr. Roy Morrow Bell
Mr. Fletcher W. Paddison
Miller, Boyko and Bell
550 West "B" Street, Suite 400
San Diego, California 92101-3599
Attorneys for Plaintiff,
Mr. Nicholas E. Tavaglione

Superior Court Clerk
Riverside County
Post Office Box 431 -- Appeals
Riverside, California 92502

Mr. Raymond Pepper
Miller, Boyko and Bell
550 West "B" Street, Suite 400
San Diego, California 92101-3599

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 15, 1994, Los Angeles, California.

Betty J. Malloy
(Original Signed)

Supreme Court, U.S.
FILED

(2) 931640 APR 18 1994

No. _____ OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term, 1994

NICHOLAS E. TAVAGLIONE,

Respondent,

v.

MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT, J. RICHARD SWARTZ, ROY E. WHITEHEAD, and RIVERSIDE NATIONAL BANK,

Petitioners.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME 1 OF 3

HAIGHT, BROWN & BONESTEEL,
Roy G. Weatherup,* and
Rita Gunasekaran
1620 26th Street, Suite 4000 North
Post Office Box 680
Santa Monica, California 90406-0608
Telephone: (310) 449-6000

Attorneys for Petitioners,
MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT, J. RICHARD SWARTZ, ROY E. WHITEHEAD, and RIVERSIDE NATIONAL BANK

*** Counsel of Record**

Westside Law Publishers • West Hollywood, CA 90069 • (310) 273-2887

86 pp

TABLE OF APPENDICES

Page

Appendix A

Opinion of the California Court of Appeal, Filed November 17, 1993 . . . . . A-1

Appendix B

Opinion of the California Supreme Court Reversing and Remanding the Case to the Court of Appeal B-1

Appendix C

Opinion of the California Court of Appeal, Filed June 15, 1992 . . . . . C-1

Appendix D

Order of the California Supreme Court Denying Review, Filed March 3, 1994 . . . . . D-1

Appendix E

Order of the Court of Appeal Denying Rehearing, Filed December 10, 1993 . . . . . E-1

Appendix F

Judgment of the Trial Court F-1

Appendix G

Petition for Rehearing of Defendants, Filed December 2, 1993 . . . . . G-1

Appendix H

First Amended Complaint F-1

Appendix I

Demurrer to First Amended Complaint I-1

Appendix J

Notice of Ruling Denying Demurrer J-1

Appendix K

Answer to Complaint K-1

Appendix L

Fourtheenth Amendment to the Constitution of the United States L-1

Appendix M

12 U.S.C. section 375b M-1

Appendix N

12 U.S.C. section 1818(a)(2) N-1

Appendix O

12 C.F.R. section 215.4(a)(1) O-1

APPENDIX A

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

FILED
OCT 17 1993
COURT OF APPEAL FOURTH DISTRICT

NICHOLAS E. TAVAGLIONE, Plaintiff and Respondent,	)	E006746
v.	)	(Super.Ct.No. R-187341)
MICHAEL C. BILLINGS, et al.,	)	
	)	**O P I N I O N**
Defendants and Appellants.	)	
	)	

APPEAL from the Superior Court of Riverside County. John P. Carroll, Judge. Affirmed.

Haight, Brown & Bonesteel, Roy G. Weatherup and Rita Gunasekaran for Defendants and Appellants.

Miller, Boyko and Bell, Roy Morrow Bell and Fletcher W. Paddison for Plaintiff and Respondent.

Michael C. Billings, Maryann Archambault, J. Richard Swartz, Roy E. Whitehead, and Riverside National Bank, defendants and appellants (hereinafter collectively referred to as defendants) appeal from the judgment in favor of Nicholas Tavaglione, plaintiff and respondent (hereinafter, plaintiff) entered following a lengthy jury trial, prosecuted by plaintiff on various theories of recovery, in which the jury returned a general verdict with special interrogatories awarding plaintiff

compensatory damages of $2,254,787 against all defendants, jointly and severally, and further awarding punitive damages of $130,000 against defendant Billings and $2,300,000 against defendant Riverside National Bank.[1] Defendants, in pursuing this appeal, raise numerous and extensive claims of error in their 119-page opening brief,[2] purportedly challenging every aspect of the judgment.

In our original disposition of this appeal, we affirmed the entire judgment concluding, for various reasons, that the jury's responses to the damage special interrogatories included in the general verdict form did not test the validity of the jury's general damage verdict and, therefore, were meaningless. As a result, we viewed the verdict as a general verdict both with respect to liability and damages. We, therefore, applied the general verdict rule and concluded the entire general damage verdict of $2,254,787 was supported by the jury's finding of liability under the defamation cause of action, even though the jury's response to the damage special interrogatory in connection with the defamation cause of action attributed only $604,787 of the total general damage verdict to that cause of action. Consequently, we did not address each of defendants' numerous claims of error but, instead, addressed only those claims which pertained, directly or indirectly, to plaintiff's recovery under the defamation cause of action. In

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[1] In accordance with the instructions contained in the "General Verdict with Special Interrogatories" submitted by the parties (discussed, in detail, below) the jury allocated the compensatory damage award among the various defendants. The trial court, recognizing liability of the defendants was joint and several, corrected the verdict, accordingly.

[2] All references to defendants' opening brief are to the "Corrected" opening brief filed by defendants on February 28, 1992, in response to our order dated January 31, 1992, advising defendants of their failure to include citations to the record as required by rule 15(a) of the California Rules of Court.

addition, we noted significant procedural deficiencies in defendants' opening brief as a result of which we declined to address various issues arguably pertinent to plaintiff's recovery under the defamation cause of action based on our conclusion defendants had not properly demonstrated error occurred in the trial court.

The Supreme Court reversed our judgment. In doing so, the court noted, among other things, that the jury's responses to the damage special interrogatories disclosed the jury's "determination that plaintiff was damaged in varying amounts by defendants' tortious activities," therefore, "only a portion (namely, $604,787) of the general verdict of $2,254,787 may be deemed to constitute damages attributable to defamation. (Tavaglione v. Billings (1993) 4 Cal.4th 1150, 1157.) The Supreme Court instructed that while plaintiff "is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence . . . where separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether that amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories." (Tavaglione v. Billings, supra, 4 Cal.4th at pp. 1158-1159.) Based on the foregoing principles, the Supreme Court concluded this court "misapplied the general verdict rule" and, therefore, "did not review the jury's responses" to the special interrogatories (other than those involving the defamation claim) to determine whether: (1) they were free from prejudicial error, (2) they were supported by substantial evidence, and (3) they were based on separate items of compensable damage so as to justify aggregating them in computing the total damage amount of the judgment. In order to sustain the judgment against defendants in the stated amount, the Court of Appeal was required to review and uphold a sufficient number of separate damage findings which, when combined, equalled or

exceeded the amount of the judgment. (Tavaglione V. Billings, supra, 4 Cal.4th at p. 1159.) The Supreme Court further held this court was "free to dispose of the remaining appellate issues [raised by defendants but not addressed by this court] on whatever grounds, procedural or substantive, [this] court deems appropriate." (Ibid.)

In accordance with the Supreme Court's instructions, we shall review and uphold a sufficient number of separate liability and damage findings which, when combined, equal or exceed the amount of the $2,254,787 judgment. We conclude, as we shall explain, that the judgment is supported by the jury's responses to the special interrogatories, regarding both liability and damages, in connection with plaintiff's second cause of action for defamation and fourth cause of action for breach of the implied covenant of good faith and fair dealing. The jury's liability and damage findings in connection with those two causes of action, in our view, are (1) free from defendants' claims of prejudicial error, (2) supported by substantial evidence and, (3) based on separate items of compensable damage so as to justify aggregating them in computing the total amount of the judgment. The jury awarded plaintiff damages of $604,787 and $1,650,800, respectively, on those two theories of recovery. Those amounts, when aggregated, total $2,255,587 and, therefore, exceed the $2,254,787 judgment. Accordingly, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The facts underlying this appeal essentially are not in dispute.[3] The board of directors of Riverside National Bank

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[3] In view of the voluminous record on appeal, consisting of 13 volumes of Joint Appendix in Lieu of Clerk's Transcript and 16 volumes of Reporter's Transcripts, and because, as above noted, the underlying facts essentially are not disputed, we take our statement of facts from plaintiff's First Amended Complaint.

("RNB"), of which plaintiff and the individually named defendants were members, adopted a bylaw at a special board meeting held February 26, 1987, which disqualified anyone in default for more than 30 days on a loan from any financial institution from serving on the board of directors.[4] Under the terms of the bylaw, if the default for more than 30 days occurred during the term of a director, that director "shall be disqualified to continue to serve as a director . . . and such person shall be deemed to have vacated his place on the Board of Directors . . . as of the date" of the 30-day default, however, the disqualified director "may be considered for appointment as a director at a future date which is at least one year after the default which gave rise to such disqualification has been cured."

Plaintiff, the single largest shareholder of RNB and an elected member of the board of directors since 1974, had loans from RNB which purportedly were in default for more than 30 days as of the date the board adopted the bylaw. Plaintiff allegedly was not given notice of the special meeting at which the bylaw was amended (see fn. 4, above) and, therefore, apparently was not present and did not participate in that action of the board. Pursuant to the newly adopted bylaw, the board of directors notified plaintiff, by certified letter dated February 26, 1987, that plaintiff did not meet the newly adopted qualifications for board members. Therefore, the board advised plaintiff that he was "disqualified to continue to serve as a director" and was "deemed to have vacated [his] place on the Board of Directors as of February 26, 1987."

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[4] The board of directors originally adopted the bylaw at a regularly scheduled monthly board meeting held February 18, 1987. Because of a perceived ambiguity in the language of the bylaw as initially adopted, which arguably created a 30-day period in which to cure a default, the board held a special meeting on February 26, 1987, to amend the bylaw and eliminate the purportedly ambiguous language.

Thereafter, in March of 1987, two articles pertaining to the board's action appeared in the local newspaper. One such article, which quoted defendant Swartz, identified in the article as RNB's executive vice president, stated, among other things, that plaintiff "was ousted from the Bank's board in late February after board members voted to remove any director who fell behind on loan payments to RNB. At the time, [plaintiff] had delinquent loans at the Bank totalling $714,405.00 according to Bank documents."[5] According to Swartz, as quoted in the article, "only [plaintiff's] loan delinquencies triggered [plaintiff's] ouster" and "the Board decided to change [RNB's] bylaws in February to prevent a Director who fell behind in loans from staying on the Board. Although the change resulted from [plaintiff's] loans, it was not aimed at [plaintiff] alone . . . ."

At about this same time, and after his removal from the RNB board of directors, plaintiff entered into an agreement to sell his shares in RNB to Bank of Hemet (also referred to as Hemet BanCorp), allegedly for the purpose of obtaining funds necessary "to cure existing defaults and pay off certain loans" from RNB. In April 1987 defendant Billings[6] wrote a letter to RNB shareholders describing plaintiff's agreement with Bank of Hemet as "illegal" and "not in the best interests of" RNB.

Based on the foregoing events, plaintiff sued defendants for damages plaintiff allegedly suffered as the result of the board's various actions. Defendants demurred to plaintiff's

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[5] The "bank document" was an apparent reference to the proxy statement prepared by RNB under the signature of defendant Billings as president in anticipation of the annual shareholders meeting then scheduled for April 15, 1987.

[6] Defendant Billings not only was a board member but also was president of RNB.

original complaint and after the trial court apparently sustained that demurrer, while granting plaintiff leave to amend, plaintiff filed his "First Amended Complaint for Illegal Ouster of Plaintiff as a Director; Invasion of Privacy; Breach of the Covenant of Good Faith and Fair Dealing; Defamation; and Interference with Contractual Relationships."[7]

In his first cause of action for "Illegal Ouster," plaintiff alleged the bylaw adopted by defendants on February 26, 1987, violated California Corporations Code section 303 which, according to the allegations of the complaint, prohibits removal of a corporate director prior to expiration of the director's term except under certain specified circumstances, none of which pertained to plaintiff. Consequently, plaintiff alleged the board's action was unlawful and constituted an illegal "ouster" of plaintiff from the board of directors. Additionally, plaintiff alleged the bylaw, by its express language, applied only to directors in default for more than 30 days after adoption of the bylaw. In immediately applying the bylaw to plaintiff, before expiration of the 30-day period, plaintiff alleged the board not only improperly adopted "an ex post facto provision," but also did not fairly apply the bylaw to other directors "similarly situated."

Relying on the foregoing allegations, plaintiff alleged he was denied access to board meetings and "other rights and privileges as a director of the corporation." In addition, plaintiff alleged, as a shareholder of the corporation, "that plaintiff has been denied representation on the Bank's board." Consequently, plaintiff alleged, "As a direct and proximate cause of the illegal action of defendants, and each of them, plaintiff has been illegally ousted as a director of the corpora-

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[7] All further references to the complaint are to plaintiff's First Amended Complaint, as identified, above.

tion and denied his rights as a shareholder. Plaintiff has sustained damages in an amount to be proven at trial."

In his second cause of action for defamation, plaintiff sought compensatory damages of $1.5 million and $3 million in punitive damages based upon defendants' publication of the information contained in the newspaper articles, as set forth above, as well as in the proxy statement and Billings' April 1987 letter to RNB's shareholders. In addition to seeking special damages based upon alleged injury to plaintiff's business as a contractor and real estate developer, plaintiff sought general damages for injury to plaintiff's reputation in the community and plaintiff's "credit and reputation with institutional lenders." Plaintiff further alleged, "As a direct and proximate result of defendants' actions, plaintiff has been forced to sell his stock in Riverside National Bank at book value, which is an amount far less than the actual fair market value of the stock."

Plaintiff's third cause of action, entitled "Wrongful Disclosure of Confidential Information," alleged plaintiff, as a depositor and loan customer of RNB, "reposed trust and confidence in the Bank to maintain [plaintiff's] financial privacy and confidentiality of his loan transactions and records." According to plaintiff, "Defendants, and each of them, had a duty to maintain the confidentiality and privacy of plaintiff's loan accounts with the Bank." Plaintiff further alleged, "As of February, 1987, plaintiff, or his companies, had been in default under the terms and provisions of the various loans with the Bank. In February, 1987 defendants conspired amongst each other and agreed upon a plan to utilize plaintiff's loan defaults as a pretense for ousting plaintiff from the board of directors and thereafter publicizing plaintiff's ouster and his loan defaults in order to damage plaintiff's credit standing and thereby force plaintiff to sell his shareholders [sic] in the Bank."

Plaintiff also alleged, defendants, in furtherance of the conspiracy, adopted the bylaw ousting plaintiff from the board of directors and published information, both in the newspaper, as set forth above, and in the proxy statement sent to shareholders, disclosing the fact and amount of plaintiff's loan defaults. "The publication and disclosure of plaintiff's loan information violated defendants' duty to maintain the privacy and confidentiality of the statements." Plaintiff contended, "As a direct and proximate result of defendants' actions, plaintiff has been required to sell off his shares in the Bank at less than fair market value and has incurred damages in the total amount of $1.5 million." Additionally, plaintiff sought punitive damages in the amount of $3 million.

In his fourth cause of action for tortious breach of the implied covenant of good faith and fair dealing, plaintiff alleged that his status as a loan customer of RNB created a duty on the part of defendants "to deal fairly and in good faith with plaintiff in connection with his loan transactions with the Bank. Defendants had the further duty to deal fairly and in good faith with plaintiff as a shareholder in the Bank to preserve and protect plaintiff's rights as a shareholder." Plaintiff further alleged defendants "breached the implied covenant of good faith and fair dealing by: [¶] (a) Formulating a plan and conspiracy to utilize plaintiff's loan defaults as the pretext for removing plaintiff from the board; [¶] (b) Improperly removing plaintiff as a director of the corporation in violation of Corporations Code § 303(c) and thereby nullifying plaintiff's rights as a shareholder to elect directors; [¶] (c) Failing to give plaintiff an opportunity to cure his loan defaults prior to the adoption of the bylaw; [¶] (d) Utilizing plaintiff's illegal ouster from the board as a pretense for subsequently publishing confidential and private information concerning plaintiff's loan accounts with the Bank and the defaults under these loans; and [¶] (e) Formulating and imple-

menting this plan to force plaintiff into selling his shareholdings in the Bank."

According to plaintiff, "As a direct and proximate cause of defendants' actions, plaintiff was held up to public contempt and ridicule, plaintiff's credit relationship with the Bank was jeopardized, plaintiff's credit relations with other banks and lending institutions was [sic] adversely affected and plaintiff was forced to sell his shareholdings in the Bank in order to pay off or otherwise cure plaintiff's credit obligations to the Bank and other lending instructions [sic]." Relying on the foregoing allegations, plaintiff sought general damages of $1.5 million for the loss he allegedly incurred in selling his stock in RNB at less than fair market value and further sought punitive damages of $3 million.

Plaintiff's fifth cause of action purported to seek compensatory and punitive damages of $1.5 million and $3 million, respectively, on the tort theory of intentional interference with plaintiff's contractual relationships with RNB based upon plaintiff's status both as a shareholder and borrower. In this cause of action, plaintiff alleged defendants knew of plaintiff's contractual relationships with RNB as both a shareholder and borrower and defendants intended, by their actions in adopting the bylaw, removing plaintiff from the board and publishing information regarding plaintiff's loan defaults, to interfere with plaintiff's ongoing business and economic relationships with RNB.

In his sixth cause of action, entitled "Interference with Contractual Relations and Prospective Advantage," plaintiff alleged defendants knew plaintiff had established banking and lending relationships with financial institutions other than RNB and intended, by "expelling" plaintiff from the board of directors and publishing information regarding plaintiff's loan defaults, to interfere with plaintiff's other financial relationships. In this cause of action, plaintiff alleged entitlement to

compensatory damages of $1.5 million allegedly incurred by plaintiff, as the direct and proximate result of defendants' actions, in paying off loans and curing loan defaults with these other financial institutions. Plaintiff also alleged entitlement to $3 million in punitive damages.

As his seventh and final cause of action, plaintiff alleged the actions of defendants, as set forth in the sixth cause of action, alternatively constituted negligent interference with plaintiff's contractual relationships with other financial institutions. Consequently, plaintiff alleged, "As a direct and proximate result of defendants' actions, plaintiff's banking relationships with the other lenders was [sic] disrupted, plaintiff was refused further extensions of credit, and plaintiff has been required to pay off loans with certain lenders and cure defaults on other loans with various lenders. As a direct and proximate result of defendants' actions, plaintiff has sustained damages in the amount of $1,500,000.00."

After the trial court overruled defendants' demurrer to plaintiff's amended pleading, defendants responded to the first amended complaint by filing an answer in the form of a general denial pursuant to Code of Civil Procedure section 431.30, subdivision (d). In their answer, defendants asserted 12 affirmative defenses which not only included the standard allegations (i.e., failure to state a cause of action, insufficient facts to support an award of punitive damages, estoppel, unclean hands, and failure to mitigate damages) but also included specific affirmative allegations, the details of which shall be discussed, as pertinent, below.

Ultimately, and after extensive pretrial proceedings none of which are pertinent to the issues raised in this appeal, the parties proceeded to a jury trial on each "cause of action" of plaintiff's first amended complaint. We shall not recount in detail the evidence presented by plaintiff and defendants during the lengthy jury trial. Summarized briefly, plaintiff

offered evidence to show that during 1986 he obtained a series of short-term, interest only loans from RNB. Each loan was fully secured and approved by defendant Billings. During 1986, the year immediately preceding the board's adoption of the bylaw pertaining to loan defaults by board members, plaintiff occasionally fell behind on monthly or quarterly interest payments on the four loans then outstanding. According to established procedure, defendant Billings routinely extended the due date for payment of the principal balance on plaintiff's loans on condition only that plaintiff was current on interest payments at the time the extension was requested. Plaintiff offered his canceled checks to show plaintiff paid all interest payments due during 1986, although some of those payments arguably were late. Plaintiff also offered evidence, specifically RNB's own records, to show that RNB, purportedly due to an error, did not credit plaintiff with a $4,000 loan payment plaintiff made in March 1986. Once RNB credited that $4,000 payment, plaintiff was not in default and, in fact, was current on all interest payments up through January 18, 1987. Therefore, according to plaintiff's evidence, as of February 18, 1987, when the board initially adopted the bylaw which removed plaintiff from the board of directors, plaintiff was 30 days in default on only one loan and that default occurred because defendant Billings refused to extend or renew that loan.

Plaintiff also offered evidence to show that defendants Swartz, Whitehead, Archambault and Billings met on February 4, 1987, apparently at Billings' request, in what plaintiff described as a "secret meeting" to discuss plaintiff's purported loan defaults and removal from the RNB board of directors. At that meeting, defendant Billings presented a written summary, which Billings apparently specially prepared, of

plaintiff's purported loan defaults.[8] At the February 18, 1987, board meeting, the board adopted the bylaw without discussion. Thereafter, and as above noted, the board held a special meeting on February 26, 1987, for purposes of amending the bylaw to eliminate a purported ambiguity which arguably created a 30-day period in which a director could cure a loan default. Plaintiff also presented evidence to show that at the time the board adopted the bylaw in February 1987 and later in March 1987 defendant Whitehead was in default by more than 30 days on loans from RNB and Bank of America, respectively, but RNB did not invoke the bylaw to remove Whitehead from the board of directors.

In their defense, defendants offered evidence to support their position that the board adopted the bylaw only after consultation with legal counsel and out of concern for the fiscal well-being of RNB in view of plaintiff's purported repeated and serious loan defaults. In other words, defendants' evidence was directed at showing the board's action in adopting the bylaw was lawful and not directed solely at plaintiff. Defendant Billings testified, in part, that the bylaw was not invoked against defendant Whitehead, at least with respect to Whitehead's RNB loan, because Whitehead had the ability to repay his obligations. Therefore, Billings, as president of RNB, determined although the loan was more than 30 days overdue, Whitehead was not in default. Additional evidence presented at trial will be discussed, as pertinent, below.

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[8] Billings' summary of plaintiff's purported loan defaults was not produced during either pretrial discovery or trial, although plaintiff apparently requested production of that document. Plaintiff suggests the summary was destroyed, but the portions of the record cited by plaintiff do not support that suggestion.

At the completion of the 30-day trial, the jury returned a "general verdict with special interrogatories" in which the jury awarded plaintiff a total general damage verdict of $2,254,787. As disclosed by their responses to the special interrogatories, the jury found liability in favor of plaintiff and against defendants on each purported theory of recovery plaintiff pursued at trial and further found the total amount of damages plaintiff suffered in connection with each theory of recovery. The jury's responses to the special interrogatories further disclose the jury found, again in connection with each theory of recovery, that defendants acted with "malice or oppression necessary for an award of punitive damages." Additional details of the general verdict with special interrogatories will be discussed, as pertinent, below. After determining liability, and in a separate proceeding, the jury also awarded plaintiff punitive damages of $2,300,000 against RNB and $130,000 against defendant Billings.

Not surprisingly, defendants moved both for judgment notwithstanding the verdict and for new trial while plaintiff, in turn, sought to recover his costs and also, pursuant to Code of Civil Procedure section 1021.1, plaintiff's attorneys' fees. The trial court denied both of defendants' post-trial motions and awarded plaintiff costs and $254,673 in attorneys' fees.

DISCUSSION

Defendants raise 17 separate purported claims of error in this appeal which effectively challenge every aspect of plaintiff's judgment. More particularly, defendants' first seven issues challenge the various purported causes of action pursued by plaintiff at trial on the grounds such causes of action either are not viable theories of recovery, as matters of law, or that the evidence presented at trial was insufficient to prove such causes of action. Next, defendants raise various claims of purported error committed by the trial court in connection with jury instructions and rulings on the admissibility of various

items of evidence. Defendants' third group of issues are directed at challenging the jury's compensatory and punitive damage awards on the grounds of excessiveness, insufficiency of the evidence and unlawfulness. Defendants further contend the trial court erred in granting plaintiff's Code of Civil Procedure section 1021.1 motion for attorneys' fees. Finally, defendants assert the trial judge was biased in favor of plaintiff and against defendants such that the "demeanor and conduct" of the trial judge, combined with the "erroneous and prejudicial evidentiary rulings," deprived defendants of their right to a fair trial.

We shall not separately address each of defendants' various and numerous contentions in this appeal. As noted previously, the jury returned a general verdict with special interrogatories regarding both liability and damages. The special interrogatories regarding liability disclose the jury found defendants' liable to plaintiff under each theory of recovery plaintiff pursued at trial. The special interrogatories regarding damage, in turn, reveal the various damage amounts the jury attributed to each theory of recovery. In Tavaglione v. Billings, supra, the Supreme Court instructed, as above noted, that in order to affirm the entire judgment of $2,254,787, we must "review the jury's responses to the special interrogatories [presumably with respect both to liability and damages] . . . to determine whether: (1) they were free from prejudicial error, (2) they were supported by substantial evidence, and (3) they were based on separate items of compensable damage so as to justify aggregating them in computing the total amount of the judgment." (Tavaglione v. Billings, supra, 4 Cal.4th at p. 1159.) The Supreme Court further instructed that in order for this court "to sustain the judgment against defendants in the stated amount," we must "review and uphold a sufficient number of separate damage findings which, when combined, equal[] or exceed[] the amount of the judgment." (Ibid.)

In accordance with the foregoing instructions, in order to obtain a reversal of the entire judgment, defendants must demonstrate reversible error in connection with each theory of recovery pursued by plaintiff at trial and upon which the jury found defendants liable. Absent such a showing by defendants, we must affirm the judgment with respect to those theories of recovery which are free from defendants' claims either of legal error or factual insufficiency, albeit in an amount supported by the jury's responses to the special interrogatories regarding damages in connection with those valid theories of recovery. We have reviewed defendants' numerous claims of error with respect to each of plaintiff's various theories of recovery. While we share defendants' view that plaintiff's first purported cause of action for damages based on defendants' "illegal ouster" or removal of plaintiff from the RNB board of directors does not, as a matter of law, state a theory of recovery which supports an award of damages, we shall not address that issue, or any of defendants' other challenges to that cause of action. Even if we were to conclude plaintiff's recovery under the first cause of action was, for some reason, invalid, that conclusion would not require reversal of the entire judgment in view of the jury's liability and damage findings in connection with plaintiff's other theories of recovery.

In addition to finding defendants illegally removed plaintiff from the RNB board of directors and finding plaintiff suffered $2,254,787 in damage as a result of that action, the jury also found defendants liable under plaintiff's defamation cause of action and further found plaintiff suffered $604,787 in damage as a result of defendants' defamatory statements. The jury also found defendants liable for breach of the implied covenant of good faith and fair dealing and further found plaintiff suffered $1,650,800 in damage as a result of defendants' breach of that implied contract term.

We conclude, as we shall explain, that the jury's findings with respect both to liability and damage in connection with plaintiff's causes of action for defamation and breach of the implied covenant of good faith and fair dealing are free from defendant's claims of prejudicial error and are supported by substantial evidence. We further conclude, again as we shall explain, the damages the jury attributed to those two theories of recovery relate to separate items of compensable injury so as to justify aggregating those two damage amounts. The aggregate of those two damage awards, in turn, exceeds the jury's total damage general verdict and, according to the Supreme Court, therefore, supports the judgment in the stated amount of $2,254,787.

Consequently, we shall only address defendants' claims of error to the extent those claims relate, directly or indirectly to plaintiff's recovery under the defamation and breach of the implied covenant of good faith and fair dealing causes of action. Accordingly, the issues we must address and resolve in this appeal are as follows:

(1) Were the facts contained in the various alleged defamatory statements attributed to defendants matters of public concern such that plaintiff not only had the burden to prove falsity of those facts but also defendants' fault in publishing them, and, if so, did plaintiff meet that burden?

(2) Was plaintiff a public figure such that the trial court erred in failing to instruct the jury that in order to return a verdict in favor of plaintiff on the defamation theory of recovery the jury must find defendants published the statements in question with knowledge of their falsity or reckless disregard for the truth?

(3) Was there sufficient evidence presented at trial to prove defendants' defamatory statements proximately caused the $604,797 in damage the jury attributed to plaintiff's cause of action for defamation?

(4) Was there sufficient evidence presented at trial to prove either a contractual or fiduciary relationship between plaintiff and defendants in connection with plaintiff's loans from RNB such that defendants owed plaintiff a duty of good faith and fair dealing in connection with those loans and, if so, was there sufficient evidence presented to prove defendants breached that implied duty?

(5) Did the trial court err in giving certain jury instructions challenged by defendants in connection with plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing, and, if so, were these instructions prejudicial?

(6) Was there sufficient evidence presented at trial to prove defendants' breach of the implied covenant of good faith and fair dealing proximately caused plaintiff $1,650,800 in damage the jury attributed to plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing?

(7) Did the trial court adequately instruct the jury on plaintiff's duty to mitigate his damages?

(8) Was the jury's compensatory damage award excessive as a matter of law?

(9) Was the punitive damage award improper, first, because defendant RNB, as an instrumentality of the federal government, was immune from liability for such damages, second, because evidence supported defendants' assertion that they relied on advice of counsel and therefore did not act with malice and finally, because the award was excessive and therefore constituted a "taking of property without due process of law"?

(10) Were defendants denied a fair trial as the result of the trial court's purported erroneous and prejudicial evidentiary rulings against defendants and purported bias in favor of plaintiff?

(11) Did defendants act reasonably in rejecting plaintiff's pretrial offer for judgment under Code of Civil Procedure section 998 such that the trial court abused its discretion in awarding plaintiff attorneys' fees under Code of Civil Procedure section 1021.1?

We are able further to reduce the issues we must address in this appeal by noting defendants' near-total failure to demonstrate that the issues asserted in this appeal were, where necessary, first raised by defendants in the trial court and therefore preserved for review on appeal. In other words, because the "party challenging a judgment has the burden of showing reversible error by an adequate record" (Ballard v. Uribe (1986) 41 Cal.3d 564, 574) defendants' claims of error must include appropriate citations to the record showing where the purported error occurred, and if appropriate, that defendants objected to that error in the proceeding below. "An appellate court is not required to search the record to determine whether or not [it] supports appellants' claim of error. It is the duty of counsel to refer the reviewing court to the portions of the record which support appellants' position." (Green v. City of Los Angeles (1974) 40 Cal.App.3d 819, 835; see Cal Rules of Court, rule 15(a).)[9] Defendants, by failing in

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[9] We included the above criticism in our original opinion in this appeal. Defendants responded to that criticism by noting they included references to the record on appeal in the introductory portions of their opening brief and in doing so complied with rule 15(a). California Rules of Court, rule 15(a) requires that, "The statement of any matter in the record shall be supported by appropriate reference to the record." In our view, rule 15(a) requires a reference to the record each time a party's brief includes a statement of matter that occurred in the trial court and therefore appears in the record. We might excuse a party's failure to comply strictly with rule 15(a) in a case where either the record on appeal or the party's brief is relatively short, such that finding record citations in the brief or matters directly in the record is not particularly

(continued...)

their opening and reply briefs to provide anything other than cursory citations to the joint appendix in lieu of clerk's transcript or to the reporter's transcript, have failed, almost without exception, to demonstrate error occurred in the trial court. In failing adequately to cite the record, defendants either misperceive the function of appellate review[10] or would have us assume the purported error was raised somewhere in the trial court and can be found by reviewing the voluminous joint appendix and reporter's transcript. Whatever the possible

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[9](...continued)
difficult. This, however, is not such a case. The record on appeal is enormous and it is nearly impossible to find matters in that record without an appropriate citation. Likewise, defendants' opening brief consists of 119 pages such that it is extremely burdensome for this court to locate references to the record which defendants may have included in some portion of the brief but which defendants did not repeat in their discussion of the issue to which the matter in the record actually relates. More importantly, in accordance with our construction of rule 15(a), and as noted previously, we returned defendants' opening brief with directions to defendants to annotate the discussion portions of that brief with appropriate citations to the record. Defendants only partially complied with our directions, including some references to the record on appeal and omitting other references necessary to support their various claims of error. To the extent those omitted record citations pertain to matters in the record essential to support defendants' various claims of error, we will not address those claims.

[10] In this regard, we note defendants apparently do misunderstand the function of an appellate court, at least with respect to reviewing the sufficiency of the evidence, as reflected in their response to plaintiff's assertion that defendants, in this connection, set out only evidence favorable to the defense. Defendants retort, in pertinent part, that "the settled rule . . . in measuring the sufficiency of the evidence," is that "this court must review the entire record on appeal." Defendants' assertion is incorrect, as we discuss in detail, below, to the extent it suggests we must read the entire record to determine what evidence was presented.

explanation, defendants generally have not met their burden of demonstrating error occurred in the lower court proceeding.

Defendants' oversight would be troublesome in a case which involved only a relatively small trial court record. The record here, however, is formidable, to say the least, and consists of over 4,000 pages of joint appendix and 3,349 pages of reporter's transcript. Assuming defendants were aware of their burden on appeal to support their claims of error with appropriate citations to the appellate record, we are compelled to interpret defendants' failure to include those citations as an implicit invitation to this court to ferret out the error ourselves. We decline defendants' invitation. To the extent we are unable to ascertain from defendants' briefs whether error occurred and where appropriate, whether defendants preserved a claim of error by appropriate objection in the trial court, we either shall not address that issue, because the error has not been preserved for review on appeal, or we shall address the issue according to our interpretation of the manner in which the error may have occurred in the trial court.

With the foregoing in mind, we begin our discussion of the 11 issues we must address in this appeal with defendants' challenges to plaintiff's defamation cause of action and the jury's related finding of liability in connection with that theory of recovery. As set out above, defendants first assert the facts contained in the various alleged defamatory statements attributed to defendants were matters of public concern. Based on that assertion, defendants contend plaintiff, in order to establish defendants' liability for defamation, had to prove falsity of the facts contained in those statements as well as defendants' fault in publishing those facts.[11] Resolution

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[11] Defendants' characterization of this issue, as set out in the caption which precedes defendants' discussion, is that "plaintiff has

(continued...)

of this issue requires us to address facts and legal principles which also are pertinent to defendants' contention, denominated above as issue number two, that plaintiff was a public figure, therefore, in order to establish defendants' liability for defamation or, alternatively, to recover punitive damages based on defendants' defamatory statements, plaintiff was required to prove defendants made the allegedly defamatory statements either knowing the statements were false or with reckless disregard for the truth. Because these two contentions are related, we shall address them both in this portion of our discussion.

1.

DEFENDANTS' CHALLENGES TO PLAIN-TIFF'S RECOVERY FOR DEFA-MATION

A. Defendants' Challenges to the Jury's Liability Finding

Defendants raise two specific challenges to the jury's liability finding in connection with plaintiff's defamation cause of action. First, and as noted above, defendants contend the facts contained in the various alleged defamatory publications attributed to defendants were matters of public concern such that plaintiff had the burden at trial to prove the falsity of those facts as well as defendants' fault, which burden plaintiff failed to meet. Next, defendants claim plaintiff was a public

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[11](...continued)
neither pleaded nor proved any cause of action for defamation since truth is an absolute defense and there can be no liability for unfavorable interpretation of the facts by others. Despite the caption, defendants do not discuss, least of all cite, any purported pleading defects. Instead, defendants' discussion focuses entirely on the evidence presented at trial and, as such, apparently is directed at challenging the sufficiency of that evidence. We, therefore, will focus our discussion, accordingly.

figure such that the trial court erred in failing to instruct the jury that in order to return a verdict in favor of plaintiff on the defamation theory of recovery the jury must find defendant published the statements in question with knowledge of their falsity or reckless disregard for the truth.

In raising their initial contention that defendants' allegedly defamatory statements pertained to matters of public concern and, therefore, plaintiff had the burden to prove both falsity and fault, defendants fail to demonstrate whether, and if so how, they raised this issue in the trial court. In their discussion of this contention, defendants' only reference to the trial transcript occurs in the context of reciting evidence offered by plaintiff to prove falsity of the purportedly defamatory statements in question. Consequently, we initially assumed the trial court instructed the jury regarding plaintiff's purported burden of proof such that defendants' contention in this regard amounted to an attack on the sufficiency of the evidence to prove falsity of the statements in question. Upon reviewing the record, however, we ascertained that the trial court did not give the jury such instruction, but instead instructed the jury, apparently at defendants' request, that, "A publication in a newspaper regarding a private citizen may be privileged if it is a matter of public interest to the residents of that community, and only published within that community. A publication is of public interest if its appeal is not merely a matter of gossip or idle curiosity but deals with substantial matters affecting the general public such as the prevention of crime and the apprehension of criminals, the obtaining of relief from socially recognized evils, or the criticism of work performed by contractors paid from public funds. The privilege cannot be defeated if there was a 'bona fide purpose to give the public the benefit of comment which it is entitled to

have, rather than for any ulterior motive of causing harm to the plaintiff.' "[12]

Because the jury was not instructed that plaintiff had the burden to prove both falsity and fault, and further, because defendants do not suggest, either explicitly or by implication, that they requested such an instruction which the trial court refused to give or that defendants otherwise raised this issue in the trial court, we need not and, therefore, shall not address defendants' initial claim of error regarding the defamation cause of action. Stated bluntly, defendants have not demonstrated this issue was raised in the trial court and thereby preserved for review on appeal.

Defendants' second challenge to the defamation cause of action, as noted above, is the trial court gave erroneous and incomplete instructions to the jury. Defendants' discussion of this issue focuses exclusively on the trial court's refusal to instruct the jury on constitutional "actual malice" according to BAJI No. 7.04 which, as requested by defendants, would have instructed the jury, in pertinent part, that, "A published statement about a public figure is absolutely privileged, even if false and untrue, unless the publication was made by the defendant with knowledge that it was false or with a reckless disregard for the truth."

Defendants raise two contentions with respect to the trial court's refusal to give the above instruction. First, defendants contend the evidence presented at trial established

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[12] Although the foregoing jury instruction includes quoted material, the instruction included in the record on appeal does not identify the authority for the quotation. Moreover, while the instruction does not identify defendants as the requesting parties, defendants acknowledged in both their motion for judgment notwithstanding the verdict and motion for new trial, that the trial court gave the instruction at defendants' request.

plaintiff was a public figure or, at the very least, a limited purpose public figure, as defined in Gertz v. Robert Welch, Inc. (1984) 418 U.S. 323. Therefore, defendants argue plaintiff was required to prove actual malice in order to establish defendants' liability for the alleged defamation and the trial court erred by refusing to instruct the jury in that regard. Alternatively, defendants contend that "[t]he settled law in this country is that no defamation plaintiff is entitled to punitive damages unless he can show that the defendant published the offensive statements with knowing falsity or with reckless disregard for the truth." Therefore, defendants contend the trial court erred in permitting the jury to award punitive damages in connection with the defamation cause of action without proof of actual malice.

In discussing these contentions, defendants first correctly point out, and with appropriate citations to the record, that the trial court refused to give BAJI No. 7.04 as requested by defendants. Instead, the trial court instructed the jury, as pertinent to this issue, "If you conclude that defendant [sic] published a libel of plaintiff with actual malice, then in your discretion you may determine whether or not to award plaintiff punitive damages."[13] The trial court further instructed

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[13] The record discloses the foregoing instruction apparently is a modification of BAJI No. 7.12. The use note accompanying BAJI No. 7.12 indicates the instruction "should be used only in cases which are filed under Civil Code, § 48a [pertaining to defamation actions against media defendants], and if punitive damages are sought in other libel/slander cases the court should use BAJI 14.17 [general instruction on recovery and measure of punitive damages]." (See BAJI No. 7.12 (7th ed. 1986) pp. 279, and related 1993 pocket part, pp. 133-134.) Because defendants are not members of the media, the trial court erred in giving this instruction. The correct instruction, as we shall explain, is BAJI No. 14.71, the general punitive damage instruction which requires and defines "malice," rather than "actual malice."

the jury according to BAJI No. 14.71[14] on "malice" necessary to support an award of punitive damages.

Defendants, as above noted, contend the trial court erred in refusing to give BAJI No. 7.04 regarding constitutional malice because plaintiff was a public figure. The general principles which govern resolution of this issue are well known and discussed thoroughly in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749. Simply stated, where the purportedly defamatory statement pertains to a public issue and the plaintiff is a public official or public figure, First Amendment free speech interests require the plaintiff prove not only that the statements are false but also that the statements were made with actual malice, i.e., knowledge of their falsity or reckless disregard for whether the statement was or was not false. (Id. at p. 755, citing New York Times Co. v. Sullivan (1964) 376 U.S. 254, and Curtis Publishing Co. v. Butts (1967) 388 U.S. 130.) Where the allegedly defamatory statement pertains to a matter of public

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[14] As given by the trial court, BAJI No. 14.71 instructed the jury, in pertinent part, that, "If you find that plaintiff suffered damage as a legal result of the conduct of defendant on which you base a finding of liability, you may then consider whether you should award punitive damages against defendants for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by clear and convincing evidence that said defendant was guilty of oppression or malice in the conduct on which you base your finding of liability. [¶] `Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried [on] by the defendant with a willful and conscious disregard for the rights or safety of others. A person acts with conscious disregard of the rights or safety of others when he or she is aware of the probable dangerous consequences of his or her conduct and willfully and deliberately fails to avoid those consequences. . . . [¶] `Despicable conduct' is conduct which is so vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people."

concern, but the plaintiff is neither a public official nor public figure, First Amendment interests, although less significant, nevertheless preclude states from allowing plaintiffs to recover "presumed or punitive damages absent a showing of 'actual malice.' " (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra, 472 U.S. at p. 756, citing Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323.) Where the allegedly defamatory statements do not involve matters of public concern and the plaintiff is neither a public official nor public figure, First Amendment concerns are minimal and the "state interest in providing remedies for defamation . . . adequately supports awards of presumed and punitive damages -- even absent a showing of 'actual malice.' [Fn. omitted.]" (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra, 472 U.S. at p. 761.) Finally, the question of whether the foregoing constitutional protections apply in any given case is one of law. (Connick v. Myers (1983) 461 U.S. 138, 148, fn. 7.)[15]

With the foregoing general principles in mind, we turn to those principles specifically pertinent to determining, as a question of law, whether plaintiff, as defendants contend, was a public figure and as such was required to prove actual malice. Here again, the specific principles which guide our analysis are discussed thoroughly by the California Supreme Court in Reader's Digest Assn. v. Superior Court (1984) 37 Cal.3d 244, where the Court noted that in Gertz v. Robert Welch, Inc., the United States Supreme Court "defined two classes of public figures. The first is the 'all purpose' public figure who has 'achiev[ed] such pervasive fame or notoriety

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[15] Defendants, in discussing this issue, also complain that the trial court refused their requested jury instruction which identified the circumstances under which a person may become a public figure. Because the determination of plaintiff's status as a public figure is a question of law, rather than fact, we conclude the trial court correctly refused defendants' instruction on that issue.

that he becomes a public figure for all purposes and in all contexts.' The second category is that of the 'limited purpose' or 'vortex' public figure, an individual who 'voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.' [Citation.] Unlike the 'all purpose' public figure, the `limited purpose' public figure loses certain protection for his reputation only to the extent that the allegedly defamatory communication relates to his role in a public controversy." (Reader's Digest Assn. v. Superior Court, supra, 37 Cal.3d at pp. 253-254, citing Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 351.)

According to the foregoing principles, and contrary to defendants' contention, we conclude, as a matter of law, that plaintiff was neither an all purpose nor limited purpose public figure. Defendants apparently contend plaintiff was an all purpose public figure as evidenced by the trial testimony of plaintiff's own witnesses that in Riverside plaintiff's name was a "household word" and even before plaintiff "ceased to be a member" of RNB's board of directors, plaintiff's "affairs" received press coverage.[16] In our view, the evidence relied on by defendants does not meet the standard enunciated by the Supreme Court in Gertz which requires "clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society" before "an . . . individual [is] . . . deemed a public personality for all aspects of his life." (Gertz v. Robert Welch, Inc., supra, 418 U.S. at p. 352.)

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[16] Defendants also point to testimony from various plaintiff's witnesses, some of whom apparently worked for plaintiff as subcontractors, that the publicity regarding plaintiff's ouster from the board of directors was so pervasive (1) their children were taunted at school as a result of the press reports and (2) the news articles negatively affected the opinion of plaintiff held by several witnesses. This evidence, in our view, undermines rather than supports defendants' general position.

Absent such evidence, "It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." (Ibid.)

Our analysis and discussion of whether plaintiff was a limited purpose public figure, i.e., in the context of the specific controversy in which the defamation occurred, is guided by the observations of the California Supreme Court in Reader's Digest Assn. v. Superior Court, supra, "that a person . . . should not be considered a `public figure' solely because that person . . . is a criminal defendant [citation]; has sought certain relief through the courts [citation]; or merely happens to be involved in a controversy that is newsworthy [citation]. Rather, as this court recognized in Vegod Corp. v. American Broadcasting Companies Inc. (1979) 25 Cal.3d 763 . . . , a 'public figure' plaintiff must have undertaken some voluntary act through which he seeks to influence the resolution of the public issues involved. [Fn. omitted.] As such, the mere involvement of a person in a matter which the media deems to be of interest to the public does not, in and of itself, require that such a person become a public figure for the purpose of a subsequent libel action. [Original emphasis.]" (Reader's Digest Assn. v. Superior Court, supra, 37 Cal.3d at p. 254.)

The evidence relied on by defendants to support their contention plaintiff was a limited purpose public figure does not establish that the controversy in question involved public issues, least of all that plaintiff voluntarily injected himself into the fray for the purpose of influencing such issues. More particularly, defendants first point to evidence that plaintiff's "ouster" from the board of RNB was a matter of "considerable interest in Riverside County" and the "incident was so newsworthy that children of plaintiff's subcontractors were allegedly taunted at school based on the press reports." Next,

defendants contend plaintiff "voluntarily injected himself into the controversy" as evidenced by the fact and content of plaintiff's interviews by the press. In our view, that evidence establishes only that the local newspaper considered plaintiff's "ouster" from the board to be newsworthy and to that end contacted plaintiff and defendants for information and comments. In short, defendants' evidence demonstrates only that as a result of press interest and coverage, plaintiff's removal from the board of directors based upon plaintiff's purported loan delinquencies became a public controversy. Such evidence, as noted above in Readers Digest Assn. v. Superior Court, is insufficient to establish plaintiff became a public figure for purposes of that controversy.

According to Reader's Digest, a plaintiff does not become a limited purpose public figure, and therefore required to prove actual malice, merely by being involved in a controversy which receives press coverage. The controversy must be one which involves "public issues." In other words, the controversy must involve a matter of legitimate public concern. In Dun & Bradstreet Inc. v. Greenmoss Builders, Inc., the United States Supreme Court "held that '[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record.' [Citation.]" (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra, 472 U.S. at p. 761.)

Looking at the content, form and context of defendants' statements, as reported in the newspaper, we conclude plaintiff's removal from the board of directors of RNB and the details of plaintiff's purported loan defaults were not matters

of public concern.[17] The public, or more particularly the local community in which the controversy occurred, had no power to influence the outcome of the purported controversy. The decision to remove plaintiff from the board of directors and the power to effect that decision here rested exclusively with the board members.[18] No discussion or debate among members of the public was necessary and, in fact, the bylaw amending the qualifications for board members specifically precluded specified members of the public, i.e., shareholders, from in any way circumventing defendants' action of removing plaintiff from the board. Moreover, the content of defendants' statements, which included not only the fact of plaintiff's removal from the board but also the specific details of plaintiff's purported loan defaults, went well beyond any legitimate interest the public might have had in the controversy.

Arguably, defendants had an interest in publicly commenting on plaintiff's removal and purported loan defaults in view of RNB's apparent dependence on the local community for its depositors and customers. In other words, RNB legitimately might be concerned that the controversy, and attendant publicity, surrounding plaintiff's removal from the board due to alleged significant loan defaults could undermine

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[17] Arguably, plaintiff's removal from the board of directors based on his purported loan defaults was a matter of legitimate concern to RNB shareholders. Because defendants do not discuss this concern and further because plaintiff introduced evidence regarding four separate allegedly defamatory statements, proof of any one of which would support recovery, we shall not address the statements contained in the proxy statement.

[18] Throughout their brief, defendants use various euphemisms to describe plaintiff's departure from the board of directors. We describe that event as plaintiff's removal from the board pursuant to the board's adoption of the now well-described bylaw.

trust and confidence in RNB among its customers and potential customers, most of whom presumably resided in the local community. Defendants' concerns in this regard, however, do not elevate an otherwise private dispute to a controversy involving public issues. In short, we conclude here, as with the credit report at issue in Dun & Bradstreet, that defendants' statements to the press involved "speech solely in the individual interest of the speaker and its specific business audience. . . . This particular interest warrants no special protection when -- as in this case -- the speech is wholly false and clearly damaging to the victim's business reputation. . . ." (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra, 472 U.S. at p. 762.) Accordingly, we conclude, as a matter of law, plaintiff was not a public figure, either for all purposes or for purposes of this controversy. Therefore, we likewise must conclude the trial court did not err in refusing to give BAJI No. 7.04, or any other jury instruction requested by defendants, regarding constitutional, or actual, malice.

We also reject defendants' contention, above noted, that punitive damages may never be recovered in a defamation action absent proof of actual malice, therefore the trial court erred in refusing to instruct the jury in this regard. Defendants' assertion simply is an incorrect statement of law. As previously discussed, above, the Supreme Court held in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra, that proof of actual malice is not required in a defamation action by a private person against a non-media defendant where the defamatory statements do not pertain to matters of public concern. Under such circumstances, presumed and punitive damages may be recovered without proof of actual malice. (Dun & Bradstreet, Inc. v. Greenmoss Builders Inc., supra, 472 U.S. at 763.)

We have concluded, as discussed previously, that plaintiff in the context of the defamation action, was not a

public figure for all purposes. We have further concluded because the defamatory statements did not relate to matters of public concern, plaintiff was not a limited purpose public figure. Although actual malice must be proved under Civil Code section 48a (see fn. 4 supra), defendants clearly are not members of the media. Consequently, in order to recover punitive damages, plaintiff must prove malice as defined in Civil Code section 3294. The trial court, as noted above, instructed the jury on both the requirement and definition of malice as used in Civil Code section 3294 by giving BAJI No. 14.71. Accordingly, we conclude, to the extent challenged by defendants, the trial court's jury instructions in connection with the defamation cause of action properly were given.

Defendants' final challenge to the defamation cause of action, albeit raised by defendants in the connection with their assertion that the compensatory damage award was excessive as a matter of law, is that "plaintiff did not meet his burden of establishing the falsity of any statement attributed to defendants." As we have previously discussed, in detail, because the publications in question did not involve matters of public concern and because plaintiff was not a public figure, plaintiff was not required to prove falsity of the statements. Stated otherwise, "The burden of proof with respect to the issue of truth or falsity is on the defendant." (Brown v. Kelly Broadcasting Co., (1989) 48 Cal.3d 711, 753, fn. 37, quoting Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal.2d 224, 233.) The trial court properly instructed the jury in this regard.

Because defendants steadfastly have adhered to the assertion that plaintiff had the burden to prove falsity, they do not address the question of whether their evidence proved the truth of each of the four defamatory statements in question. In order to dispel any suggestion that defendants may have met

their burden in this regard we briefly shall review the pertinent evidence.

We begin our discussion in this regard with the well-established principle that "a reviewing court must start with the presumption that the record contains evidence to sustain every finding of fact; the appellant must demonstrate that there is no substantial evidence to support the challenged findings; one contending the evidence does not support some particular issue of fact must set forth in his brief all the material evidence bearing upon that issue and not merely the evidence favorable to him; failure to so state the evidence shall be deemed a waiver of the claimed error. [Citations.] [Original emphasis]." (Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co. (1977) 66 Cal.App.3d 101, 152.)

Although defendants do not directly and expressly discuss the evidence pertinent to the defense of truth, they do so by implication in their misguided challenge to the sufficiency of plaintiff's evidence to prove falsity. In so doing, defendants have not complied with the foregoing obligation to recount all evidence pertinent to an issue. Defendants, therefore, have established only that there was a conflict in the evidence presented at trial. "The test of course, is not whether there is a substantial conflict in the evidence but whether there is substantial evidence in favor of the respondent. [Citations.]" (Crogan v. Metz (1956) 47 Cal.2d 398, 404.) For this reason, we conclude defendants have failed to overcome the presumption on appeal that the record contains evidence sufficient to support every factual determination essential to the underlying judgment which includes the finding, implicit in the jury's determination of liability under plaintiff's defamation theory, that defendants did not prove the truth of each of the defamatory statements.

Moreover, we conclude substantial evidence supports the jury's implied finding that some, if not all, of the publica-

tions attributed to defendants were false. Defendants acknowledge that plaintiff's defamation cause of action was based upon four allegedly defamatory publications -- the two March 1987 newspaper articles, the March 1986 [sic] proxy statement and the April 1987 letter from Billings to the shareholders. At trial, plaintiff sought to prove the two newspaper articles and the proxy statement were false because all three publications wrongly stated both the fact and amount of plaintiff's purported loan defaults. To that end, and as above noted, plaintiff presented evidence to show his loan history with RNB consisted of a series of short-term, interest only loans, the majority of which were commercial. RNB, through Billings, the president of RNB, approved all loans to members of the board of directors, and routinely rolled-over, or renewed, plaintiff's loans so long as plaintiff was current on monthly or quarterly interest payments. Plaintiff's loans were all secured with adequate collateral. Plaintiff offered evidence, consisting of his canceled checks to prove that during all of 1986 plaintiff was current on loan interest payments.

Defendants, through the testimony of Richard Larson, the credit administrator of RNB at the time pertinent to the issues raised at trial, attempted to refute plaintiff's evidence that his interest payments were current during 1986, the period arguably in question at trial. According to Larson, during 1986, plaintiff had four loans outstanding from RNB. It was developed through Larson's testimony and RNB's own records that due to a purported accounting error, RNB did not credit plaintiff with a $4,000 interest payment plaintiff made in March 1986. As a result of that error, defendants erroneously concluded plaintiff was in default on various loans when, in fact, he was not. According to defendants' own records, as of December 31, 1986, plaintiff was current in payments on two of the four loans and was delinquent on one month of interest payments on the other two. The combined delinquent interest payments on those two loans totalled approximately $3,500,

less than the amount of the plaintiff's uncredited $4,000 payment.[19] Because Billings, contrary to established procedure, did not renew or extend plaintiff's then outstanding loan, the principal balance was also due and owing.

The foregoing, in our view, constitutes substantial evidence to support the jury's implied finding that plaintiff was not in default on any loans, least of all on $715,000 in loans, as stated in the two newspaper articles and the proxy statement. In other words, defendants did not meet their burden to prove the foregoing statements were true. Accordingly, we conclude substantial evidence supports the jury's implied determination that the statements attributed to defendants in the two newspaper articles and the proxy statement were false. That implied finding is sufficient to establish defendants' liability under the defamation cause of action. Therefore, we need not address defendants' claims regarding Billings' letter to the shareholders.

In summary, for the reasons discussed above, we conclude defendants' various challenges to the jury's liability finding in connection with plaintiff's defamation cause of action either are substantively meritless or procedurally defective. In other words, we conclude that liability finding is free from defendants' purported claims of prejudicial error and, further, is supported by substantial evidence. Accordingly, we next address the jury's defamation damage finding and defendants' purported challenges thereto.

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[19] Defendants further emphasized the falsity of defendants' various statements regarding plaintiff's purported loan defaults as reported in the newspaper and contained in the proxy statement when Larson, apparently from the witness stand and during his testimony, presented plaintiff with a check from RNB for plaintiff's loan overpayment.

B. The Jury's Defamation Damage Finding

The jury attributed $604,787 in compensatory damages to plaintiff's defamation cause of action, as evidenced by the jury's response to question number 2(A) of the special interrogatories. Plaintiff offered evidence at trial to show the revenue from his construction business fell by $3,000,000 during the 12 months following publication of defendants' defamatory statements as a result of which plaintiff suffered economic loss of $604,787, i.e., the profit that lost construction business would have generated. That evidence, in turn, supports the conclusion that the jury's damage award in connection with plaintiff's defamation cause of action represents compensation for injury to plaintiff's business interests resulting from defendants' defamatory statements. As such, the $604,787 damage award represents compensation to plaintiff for a specific item of injury. In accordance with the guidance provided by the Supreme Court, as set out above, we next must determine whether that damage award is free from defendant's various claims of purported prejudicial error or factual insufficiency.

Defendants do not specifically challenge the individual damage awards the jury included in their responses to the damage special interrogatories. Instead, defendants generally challenge the total $2,254,787 compensatory damage award on the grounds the evidence was insufficient to prove defendants' actions were the proximate cause of plaintiff's damage and such award was excessive as a matter of law. In connection with those claims, defendants raise two arguments which pertain to the jury's award of damages in connection the defamation cause of action. First, defendants assert, albeit in the context of attacking the entire $2,254,787 damage general verdict as excessive, that plaintiff did not meet his burden of proving the falsity of any statement attributed to defendants.

We addressed and rejected this precise assertion in our discussion of defendants' various challenges to the jury's liability determination under the defamation cause of action. Therefore, we shall not address that claim again.

In challenging the sufficiency of the evidence to establish proximate cause, defendants assert "plaintiff did not establish that defendants proximately caused the alleged unsubstantiated losses in plaintiff's construction business." Defendants do not support this statement with a discussion of the evidence presented at trial or with citations to the record on appeal. Because defendants do not discuss this claim, we shall not address it, other than to note defendants' unsubstantiated statement does not demonstrate the insufficiency of the evidence on this issue. Defendants further state, again in the context of challenging the entire general damage verdict as excessive, the "damages awarded by the jury for plaintiff's alleged loss of construction business was [sic] also grossly excessive and not supported by the evidence." Moreover, defendants claim "plaintiff did not adduce sufficient evidence to show that any alleged loss or decrease in his construction contracts proximately caused by defendants' conduct." Once again, defendants do not support either of these assertions with a discussion of the pertinent evidence presented at trial. We construe defendants' oversight in this regard as an implicit admission that the evidence recounted above regarding plaintiff's loss of construction business and related loss of profit accurately describes the evidence presented at trial.[20]

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[20] In a separate recitation of the purported evidence presented at trial, defendants acknowledge plaintiff's testimony regarding his loss of construction business in the months following publication of the defamatory newspaper articles. Defendants also recount other evidence, presumably presented by defendants, which arguably contradicts plaintiff's evidence on this question. Defendants' purported recitation of

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That evidence, in turn, supports the jury's implied finding that defendant's defamatory statements proximately caused plaintiff's loss of construction business revenue and further supports the jury's damage award for that loss.

For the reasons discussed, we conclude the $607,787 in damages the jury attributed to plaintiff's defamation cause of action not only represents compensation for a separate item of injury but, also, is free from defendants' claims of error and, further, is supported by substantial evidence. Accordingly, we conclude $604,787 of the total general damage verdict is supported by the jury's liability and damage findings in connection with plaintiff's defamation theory of recovery.

We next address defendants' various challenges to plaintiff's recovery based upon defendants' breach of the implied covenant of good faith and fair dealing.

2.

DEFENDANTS' CHALLENGES TO PLAINTIFF'S RECOVERY FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

A. Defendants' Challenges to the Jury's Liability Finding

In connection with plaintiff's recovery for breach of the implied covenant of good faith and fair dealing, defendants contend, generally, that there is no cause of action for breach of the implied covenant of good faith and fair dealing in

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[20](...continued)
the evidence, at best, demonstrates there was conflicting evidence presented at trial with respect to plaintiff's loss of construction business revenue. Defendants' showing, however, does not demonstrate the insufficiency of the evidence to support either the fact or amount of plaintiff's loss. (Crogan v. Metz, supra, 47 Cal.2d at p. 404.)

connection with RNB's loans to plaintiff, and, in any event, the jury instructions on the subject clearly were erroneous. Despite defendants' general characterization of the issue, defendants raise two specific claims with respect to plaintiff's theory of recovery, both of which are directed at demonstrating defendants did not owe plaintiff a duty of good faith and fair dealing in connection with plaintiff's loans from RNB. First, defendants contend plaintiff failed to plead or prove defendants breached an existing contract with plaintiff which created an obligation on the part of defendants to renew or extend plaintiff's loans. Defendants next contend, as a matter of law, that plaintiff's loan agreements with RNB did not result in a fiduciary relationship between plaintiff and defendants and, therefore, defendants did not have a duty to renew or extend plaintiff's loans. We disagree with defendants' initial claim and, therefore, need not address defendants' second contention.

As defendants correctly point out, the duty of good faith and fair dealing is an implied contract term and, therefore, depends on the existence of a contract between plaintiff and defendants. As the Supreme Court explained in Foley v. Interactive Data Corporation (1988) 47 Cal.3d 654, " 'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.' [Citation.] This duty has been recognized in the majority of American jurisdictions, the Restatement [of Contracts], and the Uniform Commercial Code. [Citation.] Because the covenant is a contract term, however, compensation for its breach has almost always been limited to contract rather than tort remedies. As to the scope of the covenant, '[t]he precise nature and extent of the duty imposed by such an implied promise will depend on the contractual purposes.' [Citation.]" (Id. at pp. 683-684.)

In challenging plaintiff's theory of recovery, defendants acknowledge plaintiff's claim for breach of the implied

covenant of good faith and fair dealing was predicated on plaintiff's loans from RNB. Defendants contend, however, that plaintiff did not allege or prove defendants' breach of an existing contract with plaintiff. Despite defendants' blanket assertion that no evidence was presented at trial to establish the contractual relationship between plaintiff and defendants, defendants do not mention the evidence pertinent to this question, least of all cite the record on appeal to support this claim. Instead, defendants' only references to the record on appeal in support of this assertion are citations to plaintiff's complaint. Consequently, we construe defendants' assertion in this regard as a challenge solely to the sufficiency of that pleading.

Our discussion of defendants' challenge to the sufficiency of plaintiff's complaint will be brief. In his complaint plaintiff alleged, in pertinent part, that defendants "held [sic] a duty to plaintiff to deal fairly and in good faith with plaintiff in connection with his loan transactions with the Bank." The allegation regarding the "loan transactions," although cursory and conclusionary, nevertheless adequately alleges the requisite underlying contract between plaintiff and defendants. Moreover, any claimed lack of specificity in plaintiff's complaint with respect to the terms of the loan transactions, or contracts, in question was cured by the evidence plaintiff presented at trial, which we discuss below. In view of that evidence, the purported pleading defect could not have been prejudicial to defendants and, therefore, we reject defendants' challenge to the sufficiency of that pleading.

To the extent defendants purport to challenge the sufficiency of the evidence presented at trial to establish the requisite contractual relationship between plaintiff and defendants, we conclude defendants have waived any claim of error in that regard. As previously discussed, "one contending the evidence does not support some particular issue of fact

must set forth in his brief all the material evidence bearing upon that issue and not merely the evidence favorable to him; failure to so state the evidence shall be deemed a waiver of the claimed error." (Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co., supra, 66 Cal.App.3d at p. 152.) Defendants' blanket assertion, set forth above, that plaintiff did not present any evidence to establish defendants' breach of an existing contract between plaintiff and defendants clearly does not comport with the requirement of setting out all evidence presented on that contested issue. Moreover, defendants' assertion clearly is erroneous as revealed not only by plaintiff's recitation of the evidence presented at trial but also by defendants' own statement of relevant facts included in the introductory portions of defendants' brief.

According to the parties' respective recitations of the evidence presented at trial, plaintiff obtained a series of short term, interest only loans from RNB. Each loan was fully secured and approved personally by defendant Billings. During the course of the year preceding adoption of the bylaw, plaintiff occasionally, and perhaps even regularly, fell behind on monthly or quarterly interest payments on some or all of the four loans then outstanding. Plaintiff's delinquent payments apparently were the result of a cash flow problem plaintiff was then encountering in connection with his various business ventures. Despite plaintiff's apparent delinquent payments, defendant Billings routinely extended the due dates for plaintiff's payment of the principal owed on the loans in question, apparently on condition only that plaintiff was current on interest payments at the time plaintiff requested the extension. Defendants acknowledge, in their recitation of the pertinent evidence, that Billings, in fact, renewed or "rolled over" plaintiff's outstanding loans on numerous occasions and further acknowledge defendant Billings did so, at least during 1986, because Billings was aware of plaintiff's cash flow problems. That evidence, in our view, is sufficient to establish

either an oral agreement or an agreement implied from Billings' conduct that defendants, at the very least, would not refuse unreasonably to renew or extend plaintiff's outstanding loans while plaintiff's cash flow problem persisted and so long as plaintiff was current on the interest payments. In other words, there was evidence of an established course of conduct or implied contract between plaintiff and defendants which created a duty on the part of defendants to act in good faith and deal fairly with plaintiff in connection with renewing plaintiff's loans. Accordingly, we reject defendants' assertion that there was no evidence presented at trial to show defendants had an obligation to renew or extend plaintiff's loans.

We similarly reject defendants' purported claim there was no evidence presented at trial to show defendants breached that obligation. Again as set out above, plaintiff presented evidence at trial to show that in January 1987 Billings refused to extend plaintiff's then outstanding loans. While defendants apparently attempted to show Billings' refusal was reasonable, or in good faith, because plaintiff purportedly was delinquent in his loan payments, plaintiff, in turn, offered evidence to show the purported delinquency was the result of defendants' failure to credit plaintiff with a $4,000 loan payment plaintiff made in March 1986. Once credited, plaintiff was current on all payments on his then outstanding loans through January 18, 1987.[21] According to plaintiff's

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[21] With respect to defendants' purported accounting error in connection with the $4,000 payment, the trial court instructed the jury, "A breach of the implied covenant of good faith and fair dealing consists of action in bad faith by a party that is separate and apart from the contract with the motive to intentionally frustrate the other party's contract rights. A party does not breach the covenant of good faith and fair dealing if it acts with a reasonable good faith belief that it has the right to do so under the terms of the contract, even if it is mistaken." While defendants purport to challenge the accuracy of the first sentence

(continued...)

evidence, again as set out above, Billings' refusal to renew plaintiff's loans caused plaintiff to be in default on those outstanding obligations. Billings, in turn, relied on that default to invoke the disqualification provision under the bylaw defendants adopted in February 1987. That evidence, in our view, supports the jury's apparent finding that Billings' primary, if not sole, reason for refusing to renew plaintiff's loans was to create the default necessary to remove plaintiff from the board of directors. In other words, that evidence is sufficient to support the jury's implicit finding that defendants did not act reasonably, or in good faith, in refusing to renew plaintiff's loans and, therefore, breached the covenant of good faith and fair dealing implied in their agreement with plaintiff. In short, and contrary to defendants argument, the foregoing evidence is sufficient to support plaintiff's recovery for breach of the implied covenant of good faith and fair dealing in that such evidence establishes both the existence of an agreement, albeit either oral or implied-in-fact, between plaintiff and defendants and defendants' breach of the covenant of good faith and fair dealing implied in that agreement.

Because we conclude the evidence was sufficient to support the jury's implied finding of the requisite underlying agreement between plaintiff and defendants, we shall only briefly address defendants' additional claim that, as a matter of law, there was no fiduciary relationship between plaintiff and defendants. Defendants' contention in this regard apparently is directed at supporting their claim that they did not owe plaintiff a duty of good faith and fair dealing with respect to renewing plaintiff's loans in the absence of either a contractual

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[21](...continued)
of this instruction, a claim we address later in our discussion, we note this instruction here solely to indicate that the jury apparently rejected defendants' assertion that their failure to credit plaintiff with the payment in question was a mistake.

or fiduciary obligation. We have concluded, as set forth above, that there was sufficient evidence to support the jury's implied finding of a contractual obligation between plaintiff and defendants which, in turn, formed the basis for defendants' duty of good faith and fair dealing. Therefore, defendants' assertion regarding the absence of a fiduciary relationship and related fiduciary duty is irrelevant. Accordingly, and in summary, we reject defendants' general assertion that there is no cause of action for breach of the implied covenant of good faith and fair dealing in connection with RNB's loans to plaintiff.

Our conclusion regarding the sufficiency of the evidence presented at trial eliminates the need for us to discuss, at least in detail, defendants' various challenges to the jury instructions in connection with plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing. In this regard, defendants contend the trial court incorrectly instructed the jury that they "may find that the implied covenant of good faith and fair dealing created an obligation on the part of the lender to give the borrower advance notice of its intention to terminate the loans or its intentions to refuse to renew the loans if you find that such notice was necessary to ensure to plaintiff the benefits of his agreements with Riverside National Bank. Further, if you find that in order to ensure the benefits of the loan agreements to plaintiff it was necessary for the Bank to renew the loans a reasonable period of time to allow plaintiff to find a substitute lender or to provide plaintiff with a term loan, you may find that defendants breached the implied covenant of good faith and fair dealing in failing to give plaintiff the loans for that extended period."[22]

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[22] Defendants also complain that the trial court instructed the jury that "the bank's decision not to renew plaintiff's loans would have to be

(continued...)

Defendants' challenge to the foregoing instruction is based entirely on defendants' erroneous view that the evidence did not establish an obligation on the part of defendants to renew plaintiff's loans and, therefore, defendants did not owe plaintiff a duty of good faith and fair dealing in connection with those loans. As discussed previously, and contrary to defendants' repeated assertion, plaintiff presented evidence at trial from which the jury could find an oral or implied-in-fact agreement between plaintiff and defendants that defendants would not refuse unreasonably to renew plaintiff's loans while plaintiff's cash flow problem persisted and so long as plaintiff was current on his payments at the time such renewal was requested. Defendants, therefore, did owe plaintiff a duty of good faith and fair dealing in connection with the agreement regarding plaintiff's loans. The foregoing instruction, in our view, accurately identifies the nature and the scope of defendants' implied duty of good faith and fair dealing in that respect. Accordingly, we reject defendants' assertion that the foregoing instruction was erroneous.

Defendants also complain about various other instructions the trial court purportedly gave the jury in connection with plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing. We shall not discuss

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[22](...continued)
based upon `objective criteria and criteria upon which a reasonable loan officer, in the exercise of his discretion, would have adopted.'" In our view, that instruction is correct to the extent the instruction was intended to define the nature and extent of defendants' duty of good faith and fair dealing in connection with their oral or implied-in-fact agreement not to refuse unreasonably to renew plaintiff's loans. However, we shall not address the issue because defendants did not include a reference to the record on appeal to demonstrate the trial court, in fact, gave such an instruction. Therefore, defendants have not met their burden of demonstrating such purported error occurred. (Green v. City of Los Angeles, supra, 40 Cal.App.3d at p. 835.)

the instructions in question, first, because defendants, in raising these claims, do not include any references to the record on appeal to support their assertion the trial court gave the instructions in question and, therefore, have not met their burden of showing such error, in fact, occurred. In addition, defendants have not demonstrated the purported jury instructions were incorrect statements of law. Finally, even if we were to assume the trial court gave the instructions in question and were to assume, further, that such instructions were erroneous, defendants have not demonstrated the challenged jury instructions, individually or collectively, were "prejudicial (Code Civ. Proc., § 475) and resulted in a `miscarriage of justice.' (Cal. Const., art. VI, § 13.)" (Pool v. City of Oakland (1986) 42 Cal.3d 1051, 1069.) With respect to prejudice, defendants state only, "It is evident that there was no breach of the covenant of good faith and fair dealing in this case. The jury's conclusion to the contrary was obviously the result of the incorrect and misleading jury instructions given, and should not be permitted to stand." We previously addressed and rejected defendants' argument that the evidence was insufficient to show defendants breached the implied covenant of good faith and fair dealing. Consequently, we necessarily must reject defendants' claim of prejudice in connection with the jury instructions based on that repeated erroneous assertion.

In summary, defendants' claims of purported legal error in connection with plaintiff's cause of action based on defendants' breach of the implied covenant of good faith and fair dealing either are substantively meritless or procedurally defective. Therefore, we conclude the jury's liability finding in connection with that cause of action, as reflected in the jury's response to question number 3 of the special interrogatories, is free from defendants' claims of prejudicial error and, further, is supported by substantial evidence. Accordingly, we next must determine whether the damages the jury attributed

to that cause of action represent an item of compensable injury separate from the loss of construction business for which the jury compensated plaintiff in connection with plaintiff's cause of action for defamation.

B. The Jury's Breach of the Implied Covenant Damage Finding

According to the jury's response to question number 3(A) of the special interrogatories, the jury found the "total amount of damages suffered by plaintiff as a result of [defendants'] breach of the implied covenant of good faith and fair dealing" was $1,650,800. The instructions included in the general verdict with special interrogatories did not require the jury to identify the specific item or items of injury encompassed by the jury's various damage calculations. Instead, the jury was instructed, in connection with each theory of recovery, simply to "find . . . the total amount of damages suffered by plaintiff." Similarly, with the exception of the jury instructions in connection with plaintiff's defamation cause of action, the jury instructions in connection with plaintiff's theories of recovery did not include specific instructions on the pertinent measure of damages or otherwise inform the jury of the items of injury for which the jury could compensate plaintiff. Consequently, in order to determine whether the $1,650,800 represents a separate item of compensable injury we must look to the evidence plaintiff presented at trial with respect to damages.

Defendants acknowledge, albeit in the context of challenging such damages, that plaintiff offered evidence to show plaintiff suffered economic injury in the form of lost profits on the purported "forced sale" of his RNB stock as a result of defendants' refusal to renew plaintiff's loans. While defendants challenge plaintiff's right to recover damages for that alleged economic injury, which we address below, defendants do not dispute plaintiff presented evidence in

connection with that purported item of economic injury. We will discuss the details of plaintiff's evidence when we address defendants' challenges to plaintiff's claimed loss on the sale of his RNB stock. Our inquiry here is concerned only with the initial question of whether there was evidence presented at trial to support a damage award of $1,650,800 (the amount the jury attributed to plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing) as an item of injury separate from plaintiff's loss of construction business revenue. For that limited purpose, we note plaintiff offered evidence to show he sold his 250,690 shares of RNB stock to Hemet Bancorp (Hemet) for the book value of $6.44 per share. According to plaintiff's evidence, the value of that stock, presumably at the time plaintiff sold the shares to Hemet, was between $9.25 and $15 per share. Based on that evidence, in his closing argument, plaintiff requested damages of $2,271,251 resulting from his loss on the forced sale of his RNB stock.[23]

The foregoing evidence is sufficient to support the conclusion the jury's award of $1,650,800 represents compensation for plaintiff's purported loss on the sale of his RNB

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[23] Plaintiff apparently used a chart during closing argument to discuss plaintiff's various items of damage. In discussing the compensation plaintiff requested in connection with the loss on the sale of his RNB stock, plaintiff's counsel explained "what we did here [presumably referring to the chart] is we took the $6.44 a share and multiplied it times the number of shares that he had, 250,690. And then we took the difference between that and what he could have sold it for. And this is the loss. He lost $2,271,251." According to these figures, plaintiff apparently asked the jury to value his RNB stock at the time of the sale to Hemet at $14.48 per share, a difference of $9.05 per share over the $6.44 per share Hemet actually paid plaintiff.

stock.[24] That loss, in turn, represents an item of injury separate from plaintiff's loss of construction business revenue for which the jury compensated plaintiff in connection with plaintiff's defamation cause of action, as discussed above. Having concluded there was evidence presented at trial which would support the jury's $1,650,800 damage award as a separate item of injury, we next must determine whether that damage award is free from defendants' various claims of error and, further, is supported by substantial evidence.

As noted previously, defendants do not specifically challenge the damage awards included in the jury's responses to the special interrogatories but, instead, generally challenge the entire compensatory general damage verdict. In that context, defendants raise two claims which relate to the $1,650,800 damages the jury attributed to plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing. First, in the context of challenging the sufficiency of the evidence to prove defendants' actions proximately caused plaintiff's various items of injury, or damage, defendants contend "there was absolutely no evidence presented to show that plaintiff was compelled to sell his stock due to any act or omission of defendants." On this issue, defendants once again do not discuss all the evidence presented at trial pertinent to this question, but instead focus only on the evidence which arguably supports their claim. Defendants, therefore, are deemed to have waived their challenge to the sufficiency of the evidence. Moreover, plaintiff's brief recounts evidence presented at trial which, if the jury believed, is

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[24] In challenging the jury's compensatory damage award as excessive, defendants claim "the jury awarded plaintiff $1,622,000 for his alleged losses arising out of the sale of his [RNB] stock." Defendants do not explain the basis for this assertion nor do they include any citation to the record to support this claim. For reasons we assume now are obvious, we will not address this assertion.

sufficient to support the jury's implied finding that defendants' unreasonable refusal to renew plaintiff's outstanding loans proximately caused plaintiff's loss on the sale of his RNB stock. We briefly summarize that evidence to dispel defendants' contrary assertion.

According to plaintiff's evidence, as a result of defendants' refusal to renew or extend plaintiff's loans, defendants not only declared plaintiff in default on those obligations, but also effectively demanded immediate repayment of the entire amount owed on those outstanding obligations. Plaintiff, therefore, was obligated immediately to pay off the principal balance on those outstanding loans not only to eliminate the purported default but also to salvage his "financial position in the community." Defendants, according to the testimony of Billings as set out above, knew plaintiff had "cash flow problems," and therefore presumably knew it would be difficult for plaintiff to obtain the large amount of cash necessary to repay the outstanding loans in full. Plaintiff testified the RNB stock was the one large asset plaintiff could convert to cash in an amount sufficient to repay the loans in question. Plaintiff, therefore, entered into an agreement with Hemet to sell his shares of stock in RNB in order to obtain the funds necessary to repay those loans in full. Plaintiff apparently originally contacted Hemet in order to obtain a loan, secured by plaintiff's RNB stock, the proceeds of which plaintiff would then use to pay off the outstanding RNB loans. Hemet declined the loan but offered to purchase plaintiff's stock in RNB. Apparently because banking regulations precluded plaintiff from selling his entire block of RNB stock to Hemet without first obtaining regulatory approval, Hemet and plaintiff agreed to a transaction in which plaintiff immediately would sell 4.9 percent of his stock for cash, the balance to be sold upon receipt of the necessary regulatory approval. Hemet, in turn, agreed, as a condition of the sale, to loan, or advance, plaintiff the funds necessary to pay off plaintiff's

RNB loans, which amount apparently was to be credited against Hemet's ultimate purchase price for the stock. Hemet, purportedly recognizing plaintiff's "vulnerability," agreed to pay plaintiff book value of $6.44 per share. At trial, plaintiff offered evidence to show the value of his 250,690 shares of RNB stock was between $9.25 and $15 per share. Plaintiff testified he would not have sold his shares of RNB stock if he had not been compelled to do so in order to repay the RNB loans.

In our view, the foregoing constitutes substantial evidence to support the jury's implied finding that defendants' breach of the implied covenant of good faith and fair dealing by unreasonably refusing to renew or extend plaintiff's loans proximately caused the loss plaintiff incurred in connection with the forced sale of his RNB stock. We, therefore, reject defendants' purported challenge to the sufficiency of the evidence on that question.

In the context of challenging the entire compensatory general damage verdict on the basis of excessiveness, defendants' raise a second and final contention pertinent to the $1,650,800 damages the jury attributed to plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing and which amount we conclude is supported by the evidence regarding the loss plaintiff incurred in connection with the sale of his RNB stock. Specifically, defendants purport to challenge the expert testimony presented by plaintiff and upon which defendants contend the jury "presumably" relied in valuing plaintiff's RNB stock. In other words, defendants challenge the sufficiency of the evidence in support of the jury's damage calculation.

We will not discuss defendants' specific complaint because defendants have not cited the record on appeal to support the assertion upon which their challenge to the sufficiency of that evidence depends. Specifically, defendants

complain plaintiff's expert witness "incorrectly assumed that plaintiff's 13.4% ownership interest in [RNB] represented a controlling interest in the bank" and, further, relied on that "faulty premise" in valuing plaintiff's RNB stock. While defendants' discussion of this claim includes some citations to the record on appeal, defendants do not include a citation to that portion of record which supports their claim the expert's opinion was based on the purported "faulty premise."[25] In short, defendants have not demonstrated error occurred in the trial court and, therefore, have not demonstrated the insufficiency of the evidence to support the jury's calculation of damages.

In summary, we conclude defendants have not demonstrated either the legal invalidity or factual insufficiency of the jury's apparent finding that defendants' breach of the implied covenant of good faith and fair dealing proximately caused the injury plaintiff suffered as the result of the forced sale of his RNB stock. We further conclude defendants similarly have failed to demonstrate the evidence was insufficient to support the jury's calculation of the damage plaintiff incurred as the result of that injury. Accordingly, and for the reasons discussed, we conclude the jury's damage award of $1,650,800 based on defendants' breach of the implied covenant of good faith and fair dealing represents a separate item of damage

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[25] The only reference to the purported "faulty premise" included in those portions of the record cited by defendants is contained in a statement by defense counsel during an apparent side bar conference. Defense counsel's statement clearly is not evidence, and in any case, the jury did not hear that statement and therefore could not have considered it in reaching their verdict. Moreover, defense counsel's statement does not include sufficient information to enable this court to locate the pertinent aspects of the expert's purported testimony regarding the valuation of plaintiff's RNB stock. We decline to read the expert's entire testimony to determine whether it includes the purported "faulty premise" about which defendants complain.

which is free from defendants' claims of prejudicial error and which, further, is supported by substantial evidence.

We next address defendants' contention that the trial court failed adequately to instruct the jury on plaintiff's duty to mitigate his damages. That contention, in our view, is the only remaining issue defendants raise in this appeal which directly or indirectly relates to the jury's damage findings in connection with plaintiff's causes of action for defamation or breach of the implied covenant of good faith and fair dealing.[26]

3.

MITIGATION OF DAMAGES INSTRUCTION

Defendants contend the trial court gave inadequate instruction to the jury on plaintiff's duty to mitigate his damages, a contention we identified as issue number seven, above. Specifically, defendants contend the trial court erred in giving only one instruction on the duty to mitigate damages rather than the three instructions requested by defendants. Here again, we disagree.

With respect to plaintiff's duty to mitigate his damages, the trial court instructed the jury, "Defendants are not required to compensate plaintiff for any expenses plaintiff could have

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[26] We will not address defendants' general assertion that the jury's total compensatory damage award was excessive because we addressed those aspects of that claim which relate to plaintiff's recovery for defamation and breach of the implied covenant of good faith and fair dealing. In doing so, we concluded the evidence was sufficient to support both the fact of plaintiff's injury and the amount of damage the jury awarded plaintiff in connection with those two theories of recovery. The damages the jury attributed to those two theories of recovery, in turn, collectively exceed the total compensatory damage award. Therefore, we necessarily must reject defendants' assertion the compensatory damage award was excessive.

avoided by a reasonable effort." Defendants do not claim this instruction is an inaccurate or erroneous statement of the law. Instead, defendants argue, in effect, that their three requested instructions more fully explained to the jury the legal principle of mitigation.[27] In other words, defendants contend only that their proposed jury instructions were better than the instruction on mitigation of damages given by the trial court.

Our function is to determine whether error occurred and not to evaluate quality of performance. Defendants do not challenge the accuracy of the mitigation instruction given by the trial court but, instead, only contend that their requested instructions better stated the pertinent legal principles. Defendants, therefore, have not demonstrated any error and we need not address defendants' argument in this regard. In short, the trial court instructed the jury on plaintiff's duty to mitigate his damages, as defendants concede, therefore, no error occurred.

In accordance with the guidance the Supreme Court provided in Tavaglione v. Billings, supra, we have addressed each of defendants' various challenges to the jury's liability and damage findings in connection with plaintiff's causes of action for defamation and breach of the implied covenant of good faith and fair dealing. We conclude, for the reasons set

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[27] The three instructions defendants requested and the trial court refused are as follows:

"Where damage to person or property is threatened or inflicted by either breach of contract or tort, the injured party has the active duty to use reasonable care and diligence to protect himself and minimize the loss. If plaintiff, by his own neglect, unnecessarily enhances the damages, he cannot recover the excess."

"Plaintiff cannot recover for alleged expenses incurred in connection with his construction business which he could have avoided by reasonable effort, or which resulted from his own neglect."

"Plaintiff is not entitled to recover damages for alleged losses arising from the sale of his Bank stock in excess of those losses he could have minimized by using reasonable care."

out above, that the damages the jury awarded plaintiff in connection with those two theories of recovery, as evidenced by the jury's responses to the damage special interrogatories, represent compensation for separate items of compensable injury suffered by plaintiff. We further conclude, as discussed above, the jury's liability and damage findings in connection with those two causes of action are free from defendants' claims of prejudicial error and are supported by substantial evidence. Accordingly, we conclude the jury's general damage verdict of $2,254,787 is supported by the jury's liability and damage findings in connection with plaintiff's causes of action for defamation and breach of the implied covenant of good faith and fair dealing.[28] Our conclusion in this regard, as we have previously discussed, eliminates the need for us to determine whether other theories of recovery pursued by plaintiff at trial also support the general damage verdict. Accordingly, we need not and therefore will not address defendants' challenges to those other theories of recovery.

The remaining issues raised by defendants in this appeal, as noted above, are directed at attacking the punitive damage award, the fairness of the trial and the trial court's action granting plaintiff's motion for attorneys' fees. We

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[28] The damages the jury attributed to plaintiff's causes of action for defamation and breach of the implied covenant of good faith and fair dealing collectively exceed the jury's total general damage verdict by $800. Plaintiff, however, did not raise this apparent discrepancy in the trial court and, further has not raised the issue on appeal. Moreover, it occurs to us that the difference between the general verdict and the various damage amounts the jury included in their responses to the special interrogatories is the direct result of the confusing instructions included in the general verdict with special interrogatories form submitted to the jury. The record reveals plaintiff, at the very least, did not object to that form and may actually have been responsible for its preparation. We therefore conclude plaintiff has waived any error based on the discrepancy in question.

address each of those contentions in the remaining sections of this opinion.

4.

PUNITIVE DAMAGES AWARDS

We next address defendants' contentions pertinent to the jury's punitive damage award, issue number nine, above. In this regard defendants contend that such award was improper, first, because defendant RNB, as a federally chartered bank, was an instrumentality of the federal government and as such was immune from liability for punitive damages. Next, defendants contend the jury's award of punitive damages was improper because there was evidence that defendants, in adopting the bylaw which disqualified plaintiff from continuing to serve on the board of directors of RNB, relied on advice of counsel. Finally, defendants contend the punitive damage awards against RNB and Billings were excessive as a matter of law and as such constitute a taking of property without due process of law.

A. Immunity

Our discussion of defendants' immunity contention will be brief. Once again, defendants' discussion of this assertion does not mention whether and if so at what point defendants raised this assertion in the trial court. Presumably, immunity from liability for punitive damages is an affirmative defense and logically would have been raised by defendants in some manner prior to trial, ideally by way of a motion to strike the punitive damage allegation contained in plaintiff's amended complaint. Our review of the record reveals defendants did not challenge the punitive damage allegation in any manner prior

to trial.[29] In other words, defendants permitted the issue of punitive damages to be presented to jury without apparent objection and therefore presumably waived the assertion.

RNB asserted, belatedly in our view, the defense of immunity in defendants' collective motion for new trial. Assuming RNB did not waive the assertion, as above noted, we nevertheless conclude the contention lacks merit. RNB cites extensive authority for the general proposition that the federal government and its instrumentalities are immune from liability for punitive damages. However, RNB does not provide any authority to support the specific proposition that federally chartered national banks such as RNB, merely by virtue of their federal charter, are instrumentalities of the federal government and, therefore, similarly are immune from such liability. As plaintiff points out, numerous cases, albeit without expressly discussing the immunity issue, uphold punitive damage awards against national banks. (See, e.g., Sanchez-Corea v. Bank of America (1985) 38 Cal.3d 892, 909.)

Accordingly, for either or both of the foregoing reasons, we conclude the immunity contention lacks merit.

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[29] In reviewing the record, we have not read each of the 4,000 pages of the joint appendix in lieu of clerk's transcript and exhibits. We have, however, reviewed the 11 pages of index to the joint appendix to determine whether the title of any motion made by defendants prior to trial included the immunity assertion. The index reveals defendants did not file a written motion to strike the punitive damage allegation. Nor is the immunity contention asserted by defendants in their demurrer to plaintiff's amended complaint or motion for summary adjudication of issues. In fact, defendants did not even raise immunity as one of the affirmative defenses in their answer to plaintiff's amended complaint. We decline to read the more than 3,300 pages of reporter's transcript to determine if defendants orally moved to strike or otherwise challenge the punitive damage allegation on the basis of purported immunity.

B. Advice of Counsel

Defendants' second attack on the punitive damage awards is equally unavailing, although for different reasons. Defendants here contend the punitive damage issue should not have been submitted to the jury in light of the evidence defendants relied on the advice of counsel in enacting the bylaw which removed plaintiff from the board of directors. In other words, defendants contend advice of counsel if not a complete defense, at the very least, demonstrates defendants acted in good faith in adopting the bylaw, and thus negates malice.

Here, yet again, defendants do not mention whether this contention was raised in the trial court and if so in what context and manner. We shall not belabor that defect here because it is expedient to note, assuming the contention was raised below, it would not apply to the defamation theory of recovery. As the above-emphasized language indicates, this assertion, assuming it was raised below and further assuming it is an accurate statement of the law, would apply, if at all, to the first count for purported illegal ouster and punitive damages awarded in connection therewith. Defendants do not suggest their statements to the press, as recounted in the newspaper, were made on the advice of counsel thereby establishing defendants' good faith and concomitantly negativing malice in connection with the defamation count.

Moreover, the trial court, presumably at defendants' request, instructed the jury that, "Plaintiff cannot recover punitive damages where defendant acted in good faith reliance on the advice of counsel." The jury, as evidenced not only by the malice findings in connection with each theory of recovery but also by the punitive damage award, obviously found the actions of RNB and Billings, in connection with adoption of the bylaw and in all other respects, were not the result of good faith reliance on the advice of counsel. We are bound by this

implied finding absent a showing by defendants that it is against the weight of the evidence or legally erroneous. Defendants have not so shown. Consequently, for each of these reasons, we conclude defendants' contention regarding advice of counsel is meritless.

C. **Excessiveness**

As a final challenge to the punitive damage award defendants assert the award was excessive in light of defendants' conduct and net worth, and as such, constitutes an unconstitutional taking of defendants' property without due process of law. Again, defendants do not mention whether this assertion was raised in the trial court. We have determined defendants have preserved this issue for review on appeal by raising it in both their motion for judgment notwithstanding the verdict and motion for new trial. Correctly stated, the issue raised by defendants is whether the trial court abused its discretion in denying either defendants' motion for judgment notwithstanding the verdict or motion for new trial with respect to the punitive damage award on the grounds set forth above. We conclude, as we shall explain, that the trial court did not abuse its discretion.

The pertinent facts, as mentioned above, are after the jury returned its general verdict finding liability under each theory of recovery plaintiff pursued at trial and further finding the total amount of damage plaintiff suffered in connection with each such theory of recovery, the jury then considered the issue of punitive damages. On this issue, the jury returned a verdict awarding plaintiff punitive damages of $2,300,000 against RNB and $130,000 against Billings. The punitive

damage awards apparently represent one year's income for RNB and one year's salary for Billings.[30]

Defendants, in connection with a different issue and in an earlier portion of their brief, contend the punitive damage award must be reversed because it is impossible to determine whether that award was based upon the defamation cause of action or improperly attributed to plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing. In support of this assertion, defendants rely on Lanouette v. Ciba-Geigy Corp. (1990) 230 Cal.App.3d 889. On December 3, 1990, after defendants filed their opening brief in this appeal, the California Supreme Court granted review of Lanouette. (See Lanouette v. Ciba-Geigy Corp. (1990) 222 Cal.App.3d 1094.) Consequently, Lanouette is no longer citable authority or "good law." Because defendants do not cite any other authority to support this contention, we shall not address it, other than to note, in our view, that portion of the Lanouette opinion relied on by defendants was decided wrongly.[31] In short, we conclude the jury's punitive damage

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[30] We were unable to locate that portion of the record which supports this assertion. The financial statements of both RNB and Billings contained in the exhibit portion of the joint appendix, and cited by plaintiff to support the foregoing assertion, do not expressly identify the annual income of either defendant. However, because defendants neither discuss nor refute the portion of plaintiff's brief which includes this assertion, we assume the assertion is an accurate statement of the evidence presented in the trial court.

[31] The Lanouette court concluded, because the plaintiff in a wrongful termination of employment action was not entitled, as a matter of law, to recover tort damages for breach of the implied covenant of good faith and fair dealing, the punitive damage award, although correct under plaintiff's intentional infliction of emotional distress theory of recovery, had to be reversed because it could not be determined which theory of recovery the jury relied on in awarding punitive damages.

(continued...)

award is properly attributed to plaintiff's defamation cause of action based on the jury's finding, set out above, that defendants acted with malice or oppression in connection with that theory of recovery.

Turning to defendants' assertion that the punitive damage awards were excessive and, therefore, the trial court abused its discretion in denying defendants' motion for new trial, "It is a well-settled rule that after an exemplary damage award has been approved by the trial court with the denial of a motion for new trial, as in this case, the reviewing court will declare the amount excessive only if, upon a review of the entire record, the award must be said to be so grossly excessive as to indicate passion or prejudice on the part of the jury [citations]." (Roemer v. Retail Credit Co. (1975) 44 Cal.App.3d 926, 937.) Stated otherwise, "our review of punitive damage awards rendered at the trial level is guided by the 'historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice. . . .' [Citation.]" (Neal v.

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[31](...continued)
According to the Lanouette court, and relying exclusively on Di Giorgio Corp. v. Valley Labor Citizen (1968) 260 Cal.App.2d 268, "Where a jury verdict is erroneous in one part and the award of damages is not reasonably subject to separation, the judgment on that issue must be reversed." (Lanouette v. Ciba-Geigy Corp., supra, 230 Cal.App.3d at p. 908.) Di Giorgio, in turn, holds that because the purpose of punitive damages is to punish a defendant for his or her own wrongful conduct, a punitive damage award in a lump sum, jointly and severally, against multiple defendants in a defamation action "is not reasonably subject to separation" and therefore must be reversed. (Di Giorgio Corp. v. Valley Labor Citizen, supra, 260 Cal.App.2d at p. 276-277.) In our view, the holding in Di Giorgio does not support the conclusion arrived at by the court in Lanouette and clearly has no pertinence in this appeal where, as set out above, the jury separately awarded punitive damages against RNB and Billings.

Farmers Ins. Exchange (1978) 21 Cal.3d 910, 927, quoting Bertero v. National General Corp. (1974) 13 Cal.3d 43, 65, fn. 12.)

According to Neal v. Farmers Ins. Exchange, the factors reviewing courts should consider to determine whether punitive damage awards are excessive are "[1] the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. . . . [2] the amount of compensatory damages awarded; in general even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered is small. . . . [3] Also to be considered is the wealth of the defendant; obviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. . . . By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (Neal v. Farmers Ins. Exchange, supra, 21 Cal.3d at p. 928.)

Viewing the instant case according to the foregoing factors, we cannot conclude, as a matter of law, that the punitive damage awards here in question were excessive. In this regard we note the trial court instructed the jury according to the foregoing factors and we must presume, absent evidence to the contrary, the jury followed that instruction and considered the reprehensibility of defendants' defamatory statements as well as defendants' financial condition in calculating the amount of the respective punitive damage awards.

Defendants argue their conduct was not reprehensible and assert, as apparently they have from the inception of this litigation, that in adopting the bylaw and informing sharehold-

ers of plaintiff's purported loan defaults, "the defendant directors were fulfilling their duties as fiduciaries of the bank." The jury, and later the trial court in ruling on defendants' motion for new trial, apparently determined otherwise. More significantly, in this connection defendants do not discuss the reprehensible nature of the various defamatory statements regarding both the fact and amount of plaintiff's purported loan defaults as set forth in the newspaper articles and proxy statement. We interpret defendants' silence on this point either as a significant omission or an implicit admission that such conduct was sufficiently reprehensible to support the punitive damage verdict.[32]

Likewise, defendants do not discuss the wealth factor. Here, again, we view defendants' silence as an implicit admission that the amounts of the respective punitive damage awards against RNB and Billings, which as above noted, equate to one year of income for each defendant, do not run afoul of this factor. We similarly reject defendants' statement, unaccompanied by any discussion, that the amounts of the respective punitive damage awards are disproportionate to the compensatory damage award. As plaintiff points out, the combined total of the punitive damage awards is $2,430,000, which is nearly equal to the compensatory damage award of $2,254,787. We cannot say as a matter of law that a ratio of

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[32] For this same reason, we reject defendants' suggestion that the punitive damage awards are not supported by substantial evidence. While defendants discuss the pertinent legal principle, they fail to discuss the pertinent evidence, or lack thereof. We again take defendants' failure as an implicit admission that the evidence set out above in our discussion of the defamation cause of action is sufficient to support the punitive damage award.

one to one is disproportionate. In fact, common sense and logic suggest quite the opposite conclusion.[33]

In summary, we conclude the punitive damage awards comport with each factor enunciated in Neal and as such cannot be said to be excessive as a matter of law.

As a final challenge to the punitive damage awards defendants assert the awards in this case violate the due process clause and therefore are unconstitutional. In support of this assertion, defendants rely on Browning-Ferris Industries v. Kelco Disposal, Inc. (1989) 492 U.S. 257, 109 S.Ct. 2909, 2921, where the United States Supreme Court declined to address a due process challenge to a punitive damage award after first noting that, "The parties agree that due process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was reached in proceedings lacking the basic elements of fundamental fairness."[34]

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[33] It occurs to us, in view of Foley v. Interactive Data Corp., supra, that defendants should have requested the trial court to instruct the jury that for purposes of calculating the punitive damage awards, the jury should not consider the compensatory damages the jury attributed to plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing. Defendants do not contend they requested such an instruction and, further, do not challenge the punitive damage award on that basis. Moreover, even if we were to consider only the $604,787 the jury awarded plaintiff in connection with the defamation cause of action, we nevertheless cannot say, as a matter of law, that the ratio of those damages to the punitive damage awards is disproportionate.

[34] The Supreme Court apparently is retreating from its due process analysis in connection with punitive damage awards as evidenced by the court's recent decision in TXO Production Corp. v. Alliance Resources Corp (1993) _ U.S. _, 113 S.Ct. 2711, where the court rejected a due process challenge to a punitive damage award of $10 million where the compensatory damage award amounted only to $19,000, a ratio of 526 to one.

Relying on the foregoing language, and similar language in other cases, defendants contend the trial below "was a blatant denial of procedural safeguards to the defendants . . . . The [trial] court's rulings which permitted the admission of evidence which was highly prejudicial to the defendants, but excluded evidence which would have enabled the defendants to overcome the prejudice caused by such erroneously admitted evidence, and the innumerable erroneous jury instructions given, all bear ample testimony to this fact. The award of punitive damages violated the defendants' right to due process of law . . . ."

The problem we have in addressing this contention is one repeated throughout defendants' brief -- the total absence of any reference to, least of all discussion of, the purportedly erroneous evidentiary rulings and jury instructions. Presumably, defendants' assertions relate to purported erroneous evidentiary rulings and jury instructions identified by defendants in earlier portions of their brief, specifically, in the sections entitled "The Numerous Erroneous Evidentiary Rulings Made by the Trial Court" and "The Jury Instructions." In these sections, defendants identify the evidentiary rulings and jury instructions about which defendants purport to complain but defendants do not discuss how or why such rulings and jury instructions were erroneous. In other words, defendants have failed to demonstrate error occurred.

Moreover, we generally are not persuaded by the argument that the trial court admitted evidence "highly prejudicial" to one of the parties. Presumably, all evidence presented by one side of a lawsuit is probative and in that sense prejudicial to the other side. The relevant inquiry is whether such evidence was otherwise inadmissible or whether the probative value of the evidence substantially is outweighed by the prejudicial effect. (See Evid. Code, § 352.) In short, defendants have not raised the pertinent and legally cognizable

arguments on appeal. We, therefore, reject each of defendants' purported challenges to the jury's punitive damage awards.

5.

DENIAL OF A FAIR TRIAL

We reject defendants' assertion, raised as a separate contention in this appeal and identified as issue number 10, above, that "the demeanor and conduct of the trial judge, together with his partiality to plaintiff's case, deprived defendants of the right to a fair trial." Here, again, defendants identify the various ways in which defendants contend the trial court revealed purported bias in favor of plaintiff but, in doing so, defendants do not demonstrate error occurred. For example, defendants assert "the trial court's prejudicial predisposition became apparent on the very first day of trial when it ruled on the parties [sic] motions in limine. The trial court granted plaintiff's motion in limine to exclude the most probative and exculpatory evidence on Mr. Billings's [sic] absence of malice against the plaintiff. However, the court denied defendants' motion in limine and allowed the plaintiff to testify on the same malice issue, and as to events which occurred over 20 years prior to the time of trial." Ignoring defendants' failure to identify the purportedly "probative and exculpatory evidence" in question, apparently inviting this court to extract that information either from defendants' 119-page brief or the 7,000-page record, defendants have not shown that any error occurred.

In short, defendants' claim of purported bias consists of a laundry list of instances during trial in which the trial court ruled or acted in favor of plaintiff and against defendants. Among other things, defendants point to the fact that the trial court (1) permitted plaintiff's counsel to engage in "strong" opening argument without interruption from the bench but interrupted defendants' counsel at the start of defense opening argument and, in a side bar conference, directed there be no further argument; (2) interrupted defense counsel during cross-examination of plaintiff regarding the sale of plaintiff's

RNB stock to Hemet BanCorp and terminated that cross-examination pursuant to Evidence Code section 352, later relenting and allowing defendants only 30 minutes additional time to complete questioning on this "major aspect of damages"; and (3) the trial court admitted into evidence nine of ten trial exhibits challenged by defendants and later, after plaintiff's counsel complained, relented and admitted the tenth exhibit.

Defendants cite additional instances in which the trial court ruled against defendants apparently to support their view that the only plausible explanation for the trial court's numerous rulings in favor of plaintiff and against defendants is that such rulings were erroneous. We will not recount each of the remaining instances cited by defendants because we reject defendants' implication and suggest another plausible and probable explanation for the trial court's action is that defendants' assertions, below, may not have been supported by the law. In short, we need not determine whether the trial court properly ruled in each instance cited by defendants because defendants have not made the threshold showing that any of the rulings in question was erroneous. Accordingly, we reject the assertion that defendants were denied a fair trial and that the trial court, as evidenced by nothing more than the number of rulings in favor of plaintiff, was biased against defendants from the outset of the trial.

6.

ATTORNEYS' FEES AWARD

The final contention we must address in this appeal is defendants' claim the trial court erred in granting plaintiff's motion for attorneys' fees pursuant to Code of Civil Procedure section 1021.1. That section, as defendants acknowledge, applies only to certain counties, including Riverside, and permits the trial court to award reasonable attorneys' fees, "in an amount to be determined in the court's discretion," to the

prevailing party in a civil suit "if all of the following conditions are met:

"(1) The party has made an offer for judgment under Section 998.

"(2) That offer was not accepted within the time provided in Section 998.

"(3) The party to whom the offer was made failed to obtain a more favorable judgment. . . ." (Code Civ. Proc., §1021.1, subds. (a) & (b).)

In pursuing this contention on appeal, defendants do not challenge the foregoing conditions, thereby conceding plaintiff made the required statutory offer which defendants rejected and after which defendants failed to obtain a more favorable judgment.[35] Instead, defendants argue only that they acted reasonably in rejecting plaintiff's statutory offer and, therefore, the trial court erred in awarding attorneys' fees to plaintiff.

On the issue of reasonableness, Code of Civil Procedure section 1021.1, subdivision (c) provides in pertinent part that, "In exercising its discretion to award attorney's fees the court shall consider the following factors:

"(1) The reasonableness or lack thereof, of a party's failure to accept an offer for judgment under Section 998 in light of the facts known to the party at the time, of [sic] which, in light of all of the circumstances, should have been known to the party. Reasonableness shall be determined by a consideration of at least the following matters:

"(A) The then apparent merit or lack of merit in the claim that was the subject of the action.

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[35] Two weeks prior to trial, plaintiff made a Code of Civil Procedure section 998 offer of $980,000.

"(B) The closeness of the questions of fact and law at issue.

"(C) Whether the offeror has unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer.

"(D) Whether the action was in the nature of a 'test case,' presenting questions of far-reaching importance affecting nonparties.

"(E) The relief that might reasonably have been expected if the claimant should prevail.

"(F) The amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

"(G) Those other matters that the court may deem relevant in the interest of justice."

In addressing this issue, defendants preface their discussion with the statement that, "Applying each of those factors to the instant case, it is evident that the award of attorney's fees to the plaintiff was totally unwarranted." Defendants' discussion, charitably characterized, focuses on only four of the seven factors set out above, and, therefore, belies that prefatory statement. Specifically, defendants argue the reasonableness of rejecting plaintiff's section 998 offer, first, because "defendants reasonably believed that their conduct which gave rise to this suit [enactment of the bylaw which removed plaintiff from the RNB board of directors] was governed by federal law" and, therefore, presumably was lawful. In this regard, defendants assert they adopted the bylaw after consultation with legal counsel and out of legitimate concern over plaintiff's chronic loan defaults which jeopardized "the overall welfare of an otherwise exemplary bank." Next, defendants argue that, "The enormous amount of damages awarded to plaintiff is due in large measure to his

success on his fourth cause of action for breach of the [implied] covenant of good faith and fair dealing" which defendants contend they reasonably believed did not pertain to them in light of Foley v. Interactive Data Corp., supra. Thirdly, defendants argue that plaintiff, despite timely discovery requests, did not provide defendants with documentation to "substantiate" plaintiff's "loss of construction business," therefore, plaintiff failed to provide information necessary for defendants to evaluate the reasonableness of plaintiff's offer. Finally, defendants assert "the dearth of cases dealing with the liability of banks in this context makes it a test case,' whose determination will have far reaching importance for nonparties."[36]

We reject each of defendants' assertions. In addressing defendants' various claims, we note, at the outset, that an award of attorneys' fees under Code of Civil Procedure section 1021.1 is directed to the discretion of the trial court and, as with all such discretionary matters, will not be reversed on appeal absent a clear showing of prejudicial abuse. (See Mission Imports, Inc. v. Superior Court (1982) 31 Cal.3d 921, 932.) Defendants have not made such a showing.

On this issue defendants again fall victim to their persistent refusal to recognize plaintiff pursued his action below under various theories of recovery, any one of which, if valid, might have subjected defendants to significant liability

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[36] Defendants also note under Code of Civil Procedure section 1021.1, it is only attorneys' fees incurred from the date of plaintiff's offer to settle a month before trial which can be awarded. Although defendants, by making this assertion, imply the trial court awarded plaintiff attorneys' fees for a period greater than that authorized by statute, defendants do not demonstrate the trial court actually did so. Moreover, even if such error occurred, it would not negate an otherwise proper attorneys' fee award but only would require reduction of that award.

for damages. Consequently, while defendants reasonably may have believed their action in adopting the bylaw was lawful and otherwise legitimate, that belief does not similarly justify the conduct underlying plaintiff's defamation theory of recovery. Because defendants do not attempt to demonstrate that each of plaintiff's various theories of recovery lacked merit (Code Civ. Proc., § 1021.1, subd. (c)(1)(A)) or that each such theory involved close questions of fact and law (Code Civ. Proc., § 1021.1, subd. (c)(1)(B)) defendants have failed, at least with respect to those factors, to demonstrate the trial court clearly abused its discretion in granting plaintiff's attorneys' fees motion. Moreover, defendants cannot make the required showing because we have already determined that at least two of plaintiff's theories of recovery are valid and do not involve close questions of fact and law.

Defendants' assertion with respect to Foley v. Interactive Data Corp., supra, in our view, is disingenuous. Contrary to defendants' suggestion in the opening paragraph of their discussion of this theory of recovery, Foley does not immunize defendants from liability for breach of the implied covenant of good faith and fair dealing. Simply put, and as discussed above, Foley holds the covenant of good faith and fair dealing is an implied contract term the breach of which generally will only support recovery of contract damages rather than tort damages. Despite defendants' numerous claims of error in this appeal, defendants do not challenge the damages the jury awarded plaintiff in connection with plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing on the basis of Foley. Instead, and as discussed at length above, defendants claim only that the facts presented at trial did not establish defendants' liability for breach of the implied covenant of good faith and fair dealing. In short, defendants do not claim the damages the jury attributed to that cause of action represent improper tort damages rather than contract damages. Defendants' failure to raise that issue in this

appeal not only constitutes a waiver of that claim but, in our view, also suggests defendants did not "reasonably" believe Foley precluded plaintiff from pursuing a cause of action against defendants based on breach of the implied covenant of good faith and fair dealing.

Defendants' discussion of the two remaining factors purportedly relied on by defendants to support their "reasonableness" assertion is devoid of detail. Defendants do not expressly discuss the "documentation" or "information" plaintiff purportedly failed to produce to substantiate plaintiff's damage claim for loss of business and which defendants claim was necessary to evaluate the reasonableness of plaintiff's offer under Code of Civil Procedure section 1021.1, subdivision (c)(1)(C). Our review of the portions of the reporter's transcript cited by defendants to support this argument reveals defendants attempted to obtain documentation, including non-discoverable, privileged information such as tax returns, regarding plaintiff's claimed loss of business by serving plaintiff with a subpoena duces tecum on the first day of trial. In response to plaintiff's motion to quash that subpoena, defendants attempted to explain and presumably justify the undisputed lateness of their discovery request by pointing out that plaintiff did not provide sufficient information in response to pertinent interrogatories propounded by defendants. According to the discussion in the record, other than the last minute subpoena duces tecum, defendants did not otherwise request document production from plaintiff during the course of pretrial discovery. In short, the portion of the record relied on by defendants does not support defendants' claim that plaintiff unreasonably refused to furnish information regarding his

claimed business losses but instead reveals defendants did not request that documentation in a timely manner.[37]

Finally, defendants attempt to characterize this litigation as a "test case" due to the "dearth of cases dealing with liability of banks in this context" similarly is devoid of discussion and merit. Because defendants rely on this assertion without undertaking any discussion we must assume defendants' "test case" argument pertains to defendants' assertion, previously discussed, that federally chartered banks are instrumentalities of the federal government and therefore are immune from liability for punitive damages. We rejected that argument when earlier raised by defendants and do so again here.

Defendants, in our view, simply have failed to demonstrate the trial court clearly abused its discretion in granting plaintiff's motion for attorneys' fees under Code of Civil Procedure section 1021.1. Accordingly, we conclude defendants' contention in that regard wholly is meritless.

REQUESTS FOR JUDICIAL NOTICE

During the pendency of this appeal, defendants and plaintiff requested this court to take judicial notice of various documents. We reserved ruling on each request for judicial

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[37] Defendants also cite a "best evidence" objection raised by defendants during plaintiff's trial testimony regarding the value of plaintiff's construction business during the period from May 1, 1986, through April 30, 1987, to support the claim that plaintiff unreasonably withheld information necessary to evaluate plaintiff's claimed business losses. The trial court correctly overruled that objection apparently recognizing plaintiff was qualified to express an opinion regarding the value of his business and "best evidence" simply was not pertinent. Documents substantiating plaintiff's opinion are not foundational, as defendants apparently contend, but merely go to the weight of plaintiff's opinion. Moreover, defendants' objection does not support the inference defendants would have us draw.

notice for decision with the appeal and here address those requests.

Defendants fired the first shot in the judicial notice volley on December 11, 1990, by asking this court to take judicial notice, first, of the Government Accounting Office report to Congress, dated September 1990 entitled "Bank Insurance Fund -- Additional Reserves and Reforms Needed to Strengthen the Fund" and, second, of a purported "legislative analysis of Corporations Code section 303, subdivision (c)." According to defendants, judicial notice of the fact and content of both documents is permitted under Evidence Code section 452, subdivisions (c) and (h), pertaining, respectively, to official acts of the legislative, executive and judicial branches of state and federal governments and facts and propositions not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of indisputable accuracy.

Plaintiff returned fire on January 18, 1991, relying on the same subdivisions of Evidence Code section 452 cited by defendants in their request for judicial notice, by requesting this court take judicial notice of the 1989 Annual Report of Riverside National Bank.

Defendants fired the last shot on January 22, 1992, by requesting this court take judicial notice of various liens filed in Riverside County Superior Court against any judgment plaintiff might receive in the lawsuit which is the subject of this appeal. In connection with this final request for judicial notice, defendants relied on Evidence Code section 452, subdivision (d)(1) (pertaining to records of any court of this state) and subdivision (h), discussed above.

We deny each of the requests for judicial notice filed by defendants and plaintiff. In doing so, we resist the temptation to discuss in detail the frivolous nature of each request. We content ourselves with pointing out that each request for

judicial notice pertains to evidence which was not presented in the trial court and, therefore, is irrelevant to any of the issues raised in this appeal.

Moreover, the Evidence Code sections relied on by both sides permit us to take judicial notice only of the documents in question but not their content. In other words, we could, for example, judicially notice the fact that the GAO issued a report to Congress in September 1990 regarding the Bank Insurance Fund but we cannot take judicial notice of the content of that report. Similarly, we could take judicial notice of the fact that RNB issued an Annual Report in 1989 and the fact that various liens were filed in the trial court. Presumably, neither defendants nor plaintiff are aided by our limited ability to take judicial notice only of the existence of the documents in question. Instead, the parties' apparent arguments depend on our ability to judicially notice the content of the documents in question. Accordingly, and in any case, each request for judicial notice is denied.

ATTORNEY'S FEES ON APPEAL

Following retransfer of this matter by the Supreme Court, plaintiff filed a combined motion to dismiss defendants' appeal and for an award of attorneys' fees. We denied the motion to dismiss but reserved ruling on the attorney's fees request, which we now address.

Plaintiff's request for attorneys' fees on appeal is based on Code of Civil Procedure section 1021.1, the statute under which the trial court awarded attorneys' fees to plaintiff, as discussed above. That code section does not expressly provide for the recovery of attorneys' fees on appeal. Therefore, the issue presented here, broadly stated, is whether we should construe Code of Civil Procedure section 1021.1 to include recovery of attorneys' fees on appeal.

"[C]ase law . . . has established the general principle that statutes authorizing attorney fee awards in lower tribunals include attorney fees incurred on appeals of decisions from those lower tribunals." (Morcos v. Board of Retirement (1990) 51 Cal.3d 924, 927; see also, People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater (1985) 165 Cal.App.3d 378, 387, in which this court held, "Where attorney's fees are authorized by statute they are authorized on appeal as well as in the trial court.") The cited "general principle," in our view, constitutes a judicial determination that in order to effectuate the purpose of the legislation, a statute which specifically authorizes recovery of attorneys' fees in the trial court ordinarily should be interpreted as authorizing recovery of such fees on appeal. For example, in Morcos v. Board of Retirement, supra, the Supreme Court determined that Government Code section 31536, the attorney fee statute there in question, "was enacted to correct the disparity between private individuals living on reduced or fixed incomes who seek to recover their pension benefits versus the government entities which employ their own 'house' counsel. Construing section 31536 to permit a successful claimant to recover attorney fees incurred during the appellate process furthers this legislative intent. The relative parity between the government entity and the successful applicant that section 31536 was intended to achieve would be lost if the government were free to pursue appellate review with its own counsel while the applicant is forced to incur nonrecoverable fees in defending the trial court's decision." (Morcos v. Board of Retirement, supra, 51 Cal.3d at pp. 929.)

In accordance with the foregoing authority, we conclude plaintiff is entitled under Code of Civil Procedure section 1021.1 to recover his attorneys' fees on appeal. Our conclusion is consistent not only with the above-quoted general principle but also with the purpose of Code of Civil Procedure section 1021.1 which is "to reduce court congestion" by, among other things, encouraging "the early settle-

ment of cases." (See, Stats. 1987, ch. 1003, § 3, pp. 3359-3360.) In our view, the statutory purpose of reducing court congestion is promoted by interpreting Code of Civil Procedure section 1021.1 to include an award of attorneys' fees incurred on appeal. Liability for attorney's fees incurred not only in the trial court but also on appeal increases the incentive to settle cases early thereby reducing court congestion.

Accordingly, we conclude where, as here, a party is awarded reasonable attorneys' fees in the trial court under Code of Civil Procedure section 1021.1 and the judgment (including, when challenged, the attorney's fees award) is affirmed on appeal, that party is entitled to an award of reasonable attorneys' fees incurred in responding to the appeal. Such fees are recoverable in the trial court in accordance with the procedure for recovering costs on appeal. The trial court has discretion to determine the reasonable amount of the attorneys' fees to be awarded and shall exercise that discretion in accordance with Code of Civil Procedure section 1021.1, subdivision (d).

CONCLUSION

In undertaking our review of the numerous and extensive issues raised by defendants in this appeal, we initially were struck by defendants' apparent inability to appreciate that a jury might view the various allegations of plaintiff's complaint and the evidence pertinent thereto in a manner adverse to defendants. In the trial court, defendants adhered steadfastly to the position that defendants' actions, in all respects, were proper. The jury, as evidenced by its verdict, obviously reached a different conclusion, as did the trial court, as evidenced by its denial of defendants' post-trial motions. Although defendants' trial court stance arguably could be characterized as advocacy, we do not fully comprehend defendants' adherence to that stance in this appeal. In other

words, despite, what in our view, was an unequivocal message from the jury, defendants on appeal not only persist in their trial court assertions, but now also blame the trial court for their apparent lack of success.

On appeal, defendants compound the tactical error we believe they committed in the trial court not only by effectively requesting this court relitigate the entire dispute, but also, as the foregoing discussion reveals, perhaps ad nauseam, by failing to demonstrate adequately that error cognizable on appeal occurred in the trial court.

In summary, we conclude, for the reasons discussed above, the entire general damage verdict is supported by the jury's liability and damage findings, as disclosed by the jury's responses to the pertinent special interrogatories, in connection with plaintiff's causes of action for defamation and breach of the implied covenant of good faith and fair dealing. To the extent defendants purport to challenge either of the jury's findings in connection with those two theories of recovery, we conclude those challenges either are substantively meritless or procedurally defective. For the same reasons, we reject defendants' other claims of error in this appeal.

DISPOSITION

The judgment is affirmed in its entirety. Plaintiff to recover reasonable attorneys' fees and costs on appeal.

/s/ McKinster
J.

We concur:

/s/ Ramirez
P.J.

/s/ McDaniel
J.*

*Retired Associate Justice of the Court of Appeal, Fourth District, senior judge status (Gov. Code, § 75028.1), sitting under assignment by the Chairperson of the Judicial Council.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on April 15, 1994, I served the within *Appendix to Petition For Writ of Certiorari (Volume ____ of ____)* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(*By Express Mail: Original and 40 Copies*)

Clerk, California Court of Appeal
Fourth Appellate District
Division Two
303 West Fifth Street
San Bernardino, California 92401

Clerk of the Superior Court
for the County of Riverside
Honorable John P. Carroll, Judge
County Courthouse
4050 Main Street
Riverside, California 92501

Clerk of the Superior Court
for the County of Riverside
Indio Branch
Honorable H. Morgan Dougherty, Judge
Department C
46-209 Oasis Street
Indio, California 92201

Mr. Roy Morrow Bell
Mr. Fletcher W. Paddison
Miller, Boyko and Bell
550 West "B" Street, Suite 400
San Diego, California 92101-3599
Attorneys for Plaintiff,
Mr. Nicholas E. Tavaglione

Superior Court Clerk
Riverside County
Post Office Box 431 -- Appeals
Riverside, California 92502

Mr. Raymond Pepper
Miller, Boyko and Bell
550 West "B" Street, Suite 400
San Diego, California 92101-3599

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 15, 1994, Los Angeles, California.

Betty J. Malloy
(Original Signed)

Supreme Court, U.S.
FILED

93 1640 APR 18 1994

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

October Term, 1994

NICHOLAS E. TAVAGLIONE,

Respondent,

v.

MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT, J. RICHARD SWARTZ, ROY E. WHITEHEAD, and RIVERSIDE NATIONAL BANK,

Petitioners.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME 2 OF 3

HAIGHT, BROWN & BONESTEEL,
Roy G. Weatherup,* and
Rita Gunasekaran
1620 26th Street, Suite 4000 North
Post Office Box 680
Santa Monica, California 90406-0608
Telephone: (310) 449-6000

Attorneys for Petitioners,
MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT, J. RICHARD SWARTZ, ROY E. WHITEHEAD, and RIVERSIDE NATIONAL BANK

*** Counsel of Record**

Westside Law Publishers • West Hollywood, CA 90069 • (310) 273-2887

TABLE OF APPENDICES

Page

Appendix A

Opinion of the California Court of Appeal, Filed November 17, 1993 . . . . . A-1

Appendix B

Opinion of the California Supreme Court Reversing and Remanding the Case to the Court of Appeal B-1

Appendix C

Opinion of the California Court of Appeal, Filed June 15, 1992 . . . . . C-1

Appendix D

Order of the California Supreme Court Denying Review, Filed March 3, 1994 . . . . . D-1

Appendix E

Order of the Court of Appeal Denying Rehearing, Filed December 10, 1993 . . . . . E-1

Appendix F

Judgment of the Trial Court F-1

Appendix G

Petition for Rehearing of Defendants, Filed December 2, 1993 . . . . . G-1

Appendix H

First Amended Complaint F-1

Appendix I

Demurrer to First Amended Complaint I-1

Appendix J

Notice of Ruling Denying Demurrer J-1

Appendix K

Answer to Complaint K-1

Appendix L

Fourtheenth Amendment to the Constitution of the United States L-1

Appendix M

12 U.S.C. section 375b M-1

Appendix N

12 U.S.C. section 1818(a)(2) N-1

Appendix O

12 C.F.R. section 215.4(a)(1) O-1

APPENDIX B

TAVAGLIONE V. BILLINGS
4 Cal.4th 1150; 17 Cal.Rptr.2d 608; 847 P.2d 574 [Mar. 1993]

[No. S027895. Mar. 25, 1993.]

NICHOLAS E. TAVAGLIONE, Plaintiff and Respondent, v. MICHAEL C. BILLINGS et al., Defendants and Appellants.

SUMMARY

Plaintiff, a corporate shareholder and director, brought an action against the corporation and its officers arising from defendants' removal of plaintiff from the board of directors. Plaintiff alleged seven theories of recovery, including defamation. The jury rendered a general verdict with special interrogatories. The jury awarded plaintiff approximately $2.25 million in compensatory damages, but the jury's responses to special interrogatories disclosed it found plaintiff's damages on the defamation count were $604,787; damages on plaintiff's other theories accounted for the difference. The jury also awarded plaintiff $2.4 million in punitive damages. (Superior Court of Riverside County, No. 187341, John P. Carroll, Judge.) On appeal defendants raised 17 issues affecting each of plaintiff's theories of recovery. The Court of Appeal, Fourth Dist., Div. Two, No. E006746, limited its review to the eight defamation issues, rejected them, and upheld the entire damage award following the "general verdict rule" that a general verdict must be sustained so long as any one count or theory of recovery is supported by substantial evidence.

The Supreme Court reversed the judgment of the Court of Appeal and remanded to that court for resolution of the remaining appellate issues. It held that, since the jury specifically attributed only a fraction of the damages to defamation, reliance on the general verdict rule to limit appellate review was improper, and appellate review of the issues potentially affecting the remainder of the damage award was necessary. (Opinion by Lucas, C. J., with Panelli, Kennard, Arabian, Baxter and George, JJ., concurring. Separate dissenting opinion by Mosk, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1a-1c) **Appellate Review § 160--Disposition of Cause--Affirmance-- General Verdict Rule--Effect of Jury's Responses to Special Interrogatories: Trial § 106--Verdict and Findings of Jury.**--In an action against a corporation and certain of its officers alleging seven theories of recovery, including defamation, arising from plaintiff's removal as corporate director, the Court of Appeal erred in upholding the entire damages award. The jury rendered a general verdict awarding plaintiff approximately $2.25 million in compensatory damages, but the jury's responses to special interrogatories disclosed it found plaintiff's damages on the defamation count were $604,787; damages on plaintiff's other theories accounted for the difference. The Court of Appeal limited its review to defendants' issues relating to defamation, rejected them, and upheld the entire damage award following the "general verdict rule" that a general verdict must be sustained so long as any one count or theory of recovery is supported by substantial evidence. Since the jury specifically attributed only a fraction of the

damages to defamation, reliance on the general verdict rule was improper. Thus, appellate review of the issues potentially affecting the remainder of the damage award was necessary.

[See **Cal.Jur.3d**, Trial, § 123; 7 **Witkin**, Cal. Procedure (3d ed. 1985) Trial, § 331.]

(2) **Appellate Review § 160--Disposition of Cause--Affirmance--General Verdict Rule: Words, Phrases, and Maxims--General Verdict Rule.**--The general verdict rule provides that where several counts are tried, a general verdict will be sustained if any one count is supported by substantial evidence and is unaffected by error, despite possible insufficiency of evidence as to the remaining counts. The rule is based on the assumption that the jury found on the cause of action or theory which was supported by substantial evidence and as to which there was no error.

(3) **Damages § 3--Compensatory--Multiple Recovery.**--Regardless of the nature or number of legal theories advanced by a plaintiff, the plaintiff is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited. In contrast, where separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his or her damages, whether that amount is expressed by the jury in a single verdict or

multiple verdicts referring to different claims or legal theories.

COUNSEL

Haight, Brown & Bonesteel, Roy G. Weatherup and Rita Gunasekaran for Defendants and Appellants.

Miller, Boyko & Bell, Roy Morrow Bell, Fletcher W. Paddison, Raymond Pepper and Thomas T. Lord for Plaintiff and Respondent.

OPINION

LUCAS, C. J.--In this case, we consider the interplay between the jury's responses to special interrogatories, disclosing the amount of damages attributable to plaintiffs various theories of recovery, and the jury's general verdict, setting forth the total amount of damages awarded to plaintiff. Here, plaintiff sued defendants on several different causes of action, including defamation. The jury's general verdict awarded plaintiff approximately $2.25 million in compensatory damages, but the jury's responses to special interrogatories disclosed it found plaintiff's damages *on the defamation count* were only $604,787; damages on plaintiff's other theories accounted for the difference. The jury also awarded plaintiff $2.4 million in punitive damages.

On appeal, although defendants raised 17 issues affecting each of plaintiffs theories of recovery, the Court of Appeal limited its review to the 8 defamation issues, rejected them, and upheld the entire $2.25 million damage award on the theory that "the judgment must be affirmed so long as any one count or theory of recovery is supported by substantial evidence." Because this analysis fails to properly take into

account the jury's responses to special interrogatories, which limited to $604,787 plaintiff's damages for defamation, we will reverse the judgment and remand the cause to the Court of Appeal for disposition of the remaining appellate issues.

1. *Background Facts*

From time to time, defendant Riverside National Bank (RNB) loaned money to plaintiff, the bank's single largest shareholder and a member of its board of directors. These loans were short-term, interest-only loans, and plaintiff occasionally defaulted on interest payments. In February 1987, RNB's directors met to discuss plaintiff's defaults and the possibility of removing him from the board. The directors adopted a bylaw disqualifying anyone from serving as a director who stood in default to the bank for more than 30 days. Plaintiff, who allegedly had no notice of this special meeting, did not participate in the bylaw's adoption. The board subsequently notified plaintiff that, by reason of his current loan default, he was disqualified from continuing to serve as director.

In March 1987, two news articles appeared which quoted RNB's executive vice-president, defendant Swartz, as saying, among other things, that plaintiff had been "ousted" from the board because of delinquent loans totalling $714,405.

Following his removal from the board, plaintiff agreed with Bank of Hemet to sell his RNB stock to that bank to obtain money to cure existing defaults and repay the loans from RNB. RNB's president, defendant Billings, thereafter wrote to RNB shareholders describing plaintiff's stock sale agreement as "illegal" and "not in the best interests" of RNB.

2. *Plaintiff's Causes of Action*

Based on the foregoing facts, plaintiff sued defendants for damages allegedly incurred by their tortious conduct. We briefly describe the seven causes of action set forth in

plaintiff's complaint, as these allegations are relevant to our inquiry whether the Court of Appeal properly confined its review to the issues surrounding the defamation count.

Plaintiff's first cause of action was based on a theory of "illegal ouster"-- plaintiff asserted he was denied access to board meetings and thus was ousted as a director of RNB and denied his rights as shareholder. Plaintiff alleged the newly adopted bylaw violated section 303 of the Corporations Code, which generally prohibits removal of a corporate director prior to the expiration of his term. He also alleged the bylaw amounted to an unlawful "ex post facto provision" when applied to previously incurred loan defaults.

Plaintiff's second cause of action was based on defamation arising from defendants' publication of the information contained in the foregoing news articles and letter to shareholders. Plaintiff alleged damage to his business and reputation, as well as financial losses resulting from being forced to sell his RNB stock at less than fair market value.

Plaintiff's third cause of action was based on "wrongful disclosure of confidential information" and alleged that defendants breached their obligation of confidentiality by conspiring to disclose plaintiff's loan defaults in order to oust him from the RNB board, damage his credit standing, and force him to sell his RNB stock.

Plaintiff's fourth cause of action was based on defendants' tortious breach of the implied covenant of good faith and fair dealing, and alleged that defendants conspired to use plaintiff's loan defaults as an excuse for ousting him from the RNB board, thereby nullifying his right as a shareholder to elect directors, and forcing him to sell his RNB stock.

Plaintiff's fifth cause of action was based on a theory of intentional interference with plaintiff's contractual relationships with RNB as a shareholder and borrower. Plaintiff

alleged that defendants' wrongful acts of removing him from the RNB board and publishing information regarding his loan defaults improperly interfered with those relationships.

Plaintiff's sixth cause of action was based on "interference with contractual relations and prospective advantage," and alleged that defendant's acts interfered with plaintiff's relations with financial institutions other than RNB.

Plaintiff's seventh and final cause of action was based on negligent interference with plaintiff's relations with financial institutions other than RNB.

As to each of the foregoing causes of action, plaintiff sought compensatory and punitive damages in varying amounts for defendants' alleged tortious conduct.

3. *General Verdict With Special Interrogatories*

At the completion of the 30-day trial, the jury returned in plaintiff's favor a "general verdict with special interrogatories." As will appear, the jury's responses disclose that the jury found plaintiff had been damaged in various amounts on each cause of action.

Among other questions, the verdict form asked the jury whether either defendant RNB or defendant Billings was liable for *removing* plaintiff from RNB's board, and, if so, what was the "total amount" of plaintiff's damages for such removal. All 12 jurors found that both such defendants were liable, and that the total amount of damage was $2,254,787. The form also asked whether either RNB or Billings was liable for *defaming* plaintiff and, if so, what was the "total amount" of damages as a result thereof. By a vote of 11 to 1, the jury found that both these defendants were liable, and that plaintiff suffered defamation damages in the "total amount" of $604,787.

Other responses found defendants RNB and Billings liable for *breaching the implied covenant* of good faith, to

plaintiff' s damage in the "total amount" of $1,650,800; that these defendants and other named defendants were liable for *conspiring* to intentionally interfere with plaintiff's contractual relations with RNB, to plaintiff's damage in the amount of $1,622,000; and that defendants RNB and Billings were liable for *interfering* with plaintiff's contracts or relations with other lenders, to plaintiff's total general damage of $2,226,787. Additionally, the jury rendered a special verdict assessing punitive damages against RNB in the amount of $2.3 million and against Billings in the amount of $130,000.

As a result of the jury's general verdict and interrogatories, the trial court entered its judgment ordering that plaintiff recover (1) from defendant RNB, $2,254,787 in compensatory damages and $2.3 million in punitive damages, for a total of $4,554,787; (2) from defendant Billings, the sum of $2,254,787 in compensatory damages and $130,000 in punitive damages, for a total of $2,384,787; and (3) from three other named defendants, the sum of $1 each (as prayed).

4. *Court of Appeal Opinion*

On appeal, defendants' 119-page opening brief raised 17 contentions relating to each of the foregoing 7 causes of action. Among other contentions, defendants challenged as erroneous or inadequate the jury instructions covering these causes of action, and also disputed the sufficiency of the evidence in support thereof. The Court of Appeal, however, considered and resolved only those issues pertaining to the defamation cause of action, believing application of the "general verdict rule" (discussed below) made it unnecessary to address any other issues.

The Court of Appeal reasoned that its review of the issues was "simplified" by the principle that " 'a complaint may plead different theories on which relief is sought with legal propriety. . . . Where an appeal is taken [from a general verdict] . . . the reviewing court has the power to disregard

particular theories and to affirm the judgment on a theory which is supported by the finding and evidence in order that causes may be disposed of by a single appeal and without further proceedings in the trial court.'. . . (*Crogan v. Metz* (1956) 47 Cal.2d 398, 403 [303 P.2d 1029].) In other words, . . . where as here an appeal is taken from a general verdict returned on several counts or theories of recovery, it is presumed that the jury found in favor of the prevailing party on each count or theory of recovery and the judgment must be affirmed so long as any one count or theory of recovery is supported by substantial evidence. (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673 [117 Cal.Rptr. 1, 527 P.2d 353].)" (Fn. omitted.)

The Court of Appeal continued by observing that by reason of the "general verdict rule," it is unnecessary to determine whether every count or theory of recovery is legally valid and supports the general verdict, but only whether any *one* such theory is valid and supports that verdict. As the court stated, "In other words, we must affirm the judgment if we determine there is any theory of recovery which supports the judgment. [Fn. omitted.] This principle pertains even though the measure of damages, and thus the amount of the general damage verdict, might differ under the various theories of recovery pleaded in the complaint. (*Crogan v. Metz* [(1956)] 47 Cal.2d [398] at 404-405 [303 P.2d 1029]; *Gilman v. Nemetz* (1962) 203 Cal.App.2d 81, 94 [21 Cal.Rptr. 317].)"

The Court of Appeal explained that it relied on the jury's responses to interrogatories only insofar as they show "the jury found liability and malice in connection with each theory pursued by plaintiff at trial." The appellate court acknowledged that the jury's responses "attributed varying monetary figures to each theory of recovery," and that "[o]nly the damage amount attributed to the . . . 'illegal ouster' [theory] actually equates to the total general verdict damage

award." Yet the court stated that it was not bound by the jury's allocation of damages for purposes of applying the general verdict rule because "according to the jury instructions, plaintiff was entitled to recover the same amount of damages under any theory alleged and proved at trial."

The Court of Appeal agreed that the responses to interrogatories were useful to test the general verdict as to the issues of liability and malice, but stated that "we are unable to comprehend the function or import of the special interrogatories regarding damages." In the court's view, "we are not constrained by the damage special interrogatories in resolving the issues raised in this appeal because those interrogatories are meaningless and therefore irrelevant. [¶] . . . [W]e conclude . . . that the general verdicts of liability and damage are supported by plaintiff's defamation count. Consequently we need not address each of defendants' 17 claims of error but instead shall limit our review to those claims which relate directly or indirectly to the `cause of action' for defamation."

5. *Discussion*

(1a) As will appear, we disagree with the Court of Appeal's analysis. The jury's responses to the interrogatories clearly disclosed its finding that plaintiff had incurred only $604,787 in compensatory damages from defendants' defamation. The Court of Appeal's limited review and rejection of the defamation issues cannot sustain the entire $2.25 million judgment.

The Court of Appeal's statement that the damage interrogatories were "meaningless and irrelevant" is puzzling. Under section 625 of the Code of Civil Procedure, the trial court is permitted to direct the jury "to find upon particular questions of fact . . . . Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly." (See also *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 540-541

[138 Cal.Rptr. 705, 564 P.2d 857] [special verdict or finding primarily used to test validity of general verdict]; *Hurlbut v. Sonora Community Hospital* (1989) 207 Cal.App.3d 388, 403 [254 Cal.Rptr. 840] [same]; *Bond v. DeWitt* (1954) 126 Cal.App.2d 540, 544 [272 P.2d 561] [special interrogatory response finding no fraud by defendants deemed inconsistent with general verdict awarding plaintiff damages, where fraud only viable cause of action].) Nothing in section 625 or California case law suggests that the section is inapplicable to special findings regarding damages as were made here. (See *Pressler v. Irvine Drugs, Inc.* (1985) 169 Cal.App.3d 1244, 1249 [215 Cal.Rptr. 807] [approving use of special interrogatories to allocate general verdict damages between medical expenses, lost earnings, and general damages].)

(2) The "general verdict rule" relied on by the Court of Appeal provides that where several counts are tried, a general verdict will be sustained if any one count is supported by substantial evidence and is unaffected by error, despite possible insufficiency of evidence as to the remaining counts. (See *McCloud v. Roy Riegels Chemicals* (1971) 20 Cal.App.3d 928, 935-936 [97 Cal.Rptr. 910].) The rule is based on the assumption "that the jury found on the cause of action or theory which was supported by substantial evidence and as to which there was no error," an assumption that may be proven incorrect by the special verdict or response to special interrogatories. (Id. at p. 936.)

(1b) Here, the jury's responses to the special interrogatories disclosed its determination that plaintiff was damaged in differing amounts by defendants' tortious activity. Among other responses, the jury found that plaintiff's damages resulting from defendants' defamation amounted to $604,787, those resulting from defendants' breach of the implied covenant totaled $1,650,800, and plaintiff's "total damages" from being removed from the RNB board were $2,254,787. (Inex-

plicably, the two lesser damage figures add to $2,255,587. Perhaps the $1,650,800 figure was intended to be $1,650,000.)

As indicated in the jury's remaining responses, plaintiff was also damaged in the amount of $1,622,000 by defendants' interference with plaintiff's contractual relations with others, but this damage seemingly overlapped damages plaintiff suffered through breach of the implied covenant and was probably included in the $2,254,787 total damage figure. Using the jury's special finding as to defamation damages to "test" the general verdict, it seems incontrovertible that only a portion (namely, $604,787) of the general verdict of $2,254,787 may be deemed to constitute damages attributable to defendants' defamation.

Plaintiff contends that defendants waived the right to assert any inconsistency between the responses to special interrogatories and the general verdict. According to plaintiff, defendants agreed to the form of the verdict, declined to request resubmission of any issues to the jury, and failed to raise the supposed inconsistency in their postjudgment motions.

We think plaintiff misconceives the precise nature of the inquiry before us. Our present task is not to reconcile the various responses to the special interrogatories with the general verdict, but to determine whether the Court of Appeal properly affirmed a judgment for $2,254,787 in compensatory damages and $2.3 million in punitive damages by reviewing only those issues pertaining to a $604,787 component of that judgment. Even assuming defendants waived their right to object to the verdict form or to assert inconsistencies in the verdict, the fact remains that the jury specifically found defendants' defamation of plaintiff amounted to only a fraction of the total damages suffered by him. Thus, some appellate issues potentially affecting the remainder of these damages have not been reviewed, including substantial issues underly-

ing plaintiff's theory of illegal ouster. (Defendants' opening brief on appeal appears to contain numerous issues pertinent to causes of action other than the defamation cause.) We conclude that, under such circumstances, reliance on the general verdict rule to limit review of the issues was improper.

The Court of Appeal's reliance on *Crogan v. Metz* (1956) 47 Cal.2d 398, 404-405 [303 P.2d 1029], and *Gilman v. Nemetz* (1962) 203 Cal.App.2d 81, 94 [21 Cal.Rptr. 317], seems misplaced. These cases allow application of the general verdict rule despite variances in the measure and amount of damages under the various theories of recovery. Neither *Crogan* nor *Gilman*, however, involved special findings which assigned specific damage amounts to specific theories of recovery. Neither case suggests that the general verdict rule would apply despite such special findings.

As for the Court of Appeal's statement that under the instructions plaintiff was entitled to recover the same amount of damages under any of plaintiff's various theories, we have reviewed the instructions and none of them would preclude a finding of differing amounts of damage for each theory of recovery. Indeed, as a matter of logic, it would seem unlikely that plaintiff's damages from being *defamed* by defendants would be identical to the damages he incurred from being *ousted* from RNB's board of directors. Unlike the cases cited by plaintiff (e.g., *Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1182 [272 Cal.Rptr. 304]), these theories of recovery seem based on different "primary" rights and duties of the parties.

(3) Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. (*Shell v. Schmidt* (1954) 126 Cal.App.2d 279, 291 [272 P.2d 82].) Double or

duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited. (*Ibid.*)

Thus, for example, in a case in which the plaintiff's only item of damage was loss of commissions, two awards of damages identical in amount--one for breach of contract and the other for bad faith denial of the same contract--could not be added together in computing the judgment. Plaintiff was entitled to only one of the awards. (*DuBarry Internat., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 563-565 [282 Cal.Rptr. 181]; see also *Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 995-996 [149 Cal.Rptr. 119] [impermissible double recovery where no separate evidence supported distinct awards of damages in contract and tort].)

In contrast, where separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether that amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories. (See *Pat Rose Associates v. Coombe* (1990) 225 Cal.App.3d 9, 20 [275 Cal.Rptr. 1], disapproved on other grounds in *Adams v. Murakami* (1991) 54 Cal.3d 105, 116 [284 Cal.Rptr. 318, 813 P.2d 1348] [recovery of sum of (1) out-of-pocket loss recovered under fraud theory and (2) lost profits damages recovered under contract theory permissible where damage items were distinct and entire amount of injury was compensable under fraud theory in any event].)

(Ic) Because the Court of Appeal herein misapplied the general verdict rule, it did not review the jury's responses to the special interrogatories (other than those involving the defamation claim) to determine whether: (1) they were free from prejudicial error, (2) they were supported by substantial evidence, and (3) they were based on separate items of

compensable damage so as to justify aggregating them in computing the total amount of the judgment. In order to sustain the judgment against defendants in the stated amount, the Court of Appeal was required to review and uphold a sufficient number of separate damage findings which, when combined, equalled or exceeded the amount of the judgment. This review was not undertaken.

In response to the dissent herein, we note that although the Court of Appeal mentioned the procedural concerns cited by the dissent, the court nonetheless elected to reach the merits of the defamation issues raised on appeal. On remand, the Court of Appeal will be free to dispose of the remaining appellate issues on whatever grounds, procedural or substantive, that court deems appropriate.

The judgment of the Court of Appeal is reversed and the cause is remanded to that court for resolution of the remaining appellate issues.

Panelli, J., Kennard, J., Arabian, J., Baxter, J., and George, J., concurred.

MOSK, J.--I dissent for procedural reasons.

First, we should not have granted review of this case. The California Rules of Court give us the discretionary authority to grant review only when "it appears necessary to secure uniformity of decision or the settlement of important questions of law . . . ." (Cal. Rules of Court, rule 29(a)(1).) This case meets neither criterion. Indeed, though I concede its importance to the parties, its public significance is minimal. As the majority opinion illustrates, whatever errors of law the Court of Appeal may have committed in its unpublished opinion, there are both statutes and published case law on point. (See maj. opn., *ante*, pp. 1156-1157.)

Second, having granted review, we should not reach the result the majority do. This case should not be remanded

to the Court of Appeal to address the remaining issues. Rather, because the remaining issues appear to be defectively presented on appeal, the Court of Appeal's judgment should be affirmed. The case's chronology indicates that defendants failed to meet the requirements of the appellate court.

Ordinarily a party to civil litigation may not file a printed brief on appeal longer than 40 pages. (Cal. Rules of Court, rule 15(e); cf. *id.*, rule 37(c) [criminal cases].) Defendants moved to file an opening brief of approximately 120 typewritten pages, which they represented to be the equivalent of about 80 printed pages. The Court of Appeal accommodated defendants' request over plaintiff's opposition.[1]

Defendants then filed an opening brief that, according to plaintiff, was not 80 printed pages long, but 109.[2]

The Court of Appeal found that brief unsatisfactory. The court ordered defendants to annotate it because "citations to the record are not included to support factual and procedural matters contained in the Argument sections, pages 40 through 108."

Thereupon defendants filed their corrected opening brief. That brief, which the record does contain, is 119 pages

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[1] Plaintiff correctly observed that "it is harder to write a shorter brief than . . . a longer brief" but that, absent the court rules' limits on the length of briefs "the court would be burdened with briefs [that are lengthy, repetitive and contain unnecessary verbiage."

[2] I rely on plaintiff's description of the length of defendants' original opening brief, because for reasons that will appear, the record on appeal does not contain it.

In a request for modification, defendants now declare they obtained by telephone the court clerk's permission to file a brief of this size.

long. It is densely composed in what appears to be a 12-point times roman font on 14-point lines.

Remarkably, despite the new brief's density and length, the Court of Appeal found that it still failed to include sufficient references to the record. The court's irritation turned to wrath. In its opinion the court declared it proper to "reduce the issues we must address in this appeal" because of "defendants' near-total failure to demonstrate that the issues asserted on appeal first were raised by defendants in the trial court. In other words, because the 'party challenging a judgment has the burden of showing reversible error by an adequate record' [citation] defendants' claims of error must include appropriate citations to the record showing where the purported error occurred, and if appropriate, that defendants objected to that error in the proceeding below. Defendants, by failing in their opening and reply briefs to provide anything other than cursory citations to the joint appendix in lieu of clerk's transcript or to the reporter's transcript, have failed, almost without exception, to demonstrate [that] error occurred in the trial court. In failing adequately to cite the record, defendants either misperceive the function of appellate review [footnote omitted] or would have us assume the purported error was raised somewhere in the trial court and can be found by reviewing the voluminous joint appendix and reporter's transcript. . . .

"Defendants' oversight would be troublesome in a case which involved only a relatively small trial court record. The record, here, however, is formidable . . . . Assuming defendants were aware of their burden on appeal to demonstrate that defendants complained of the purported error in the trial court, we can only interpret defendants' failure to include appropriate citations to the record as an implicit invitation to this court to ferret out the error ourselves. We decline defendants' invitation."

The Court of Appeal was correct. "An appellate court is not required to search the record to determine whether or not [it] supports appellants' claim of error. It is the duty of counsel to refer the reviewing court to the portions of the record which support appellants' position." (*Green v. City of Los Angeles* (1974) 40 Cal.App.3d 819, 835 [115 Cal.Rptr. 685]; see Cal. Rules of Court, rule 15(a).)

Like the majority, I believe the Court of Appeal is entitled on remand to resolve the remaining issues on procedural grounds to the extent the law permits.

Specifically: if defendants did not raise claims of instructional error in the trial court those claims may be waived, depending on whether the asserted error was one of law and plain on the instruction's face, or rather one of omission (i.e., incompleteness) or excessive generality. (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 333-334 [5 Cal.Rptr.2d 594], quoting *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 948-949 [160 Cal.Rptr. 141, 603 P.2d 58]; *Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1010 [283 Cal.Rptr. 644].) In the case of a purported omission, the claim of instructional error is not preserved for appeal unless defendants can show they offered and were refused an alternative instruction that would have cured the asserted defect. (See *Weller v. American Broadcasting Companies, Inc., supra*, 232 Cal.App.3d at p. 1010.)

And if defendants did not raise objections to evidentiary rulings on the grounds urged on appeal as constituting the basis for error, they have waived those claims. "Failure to make a timely objection or motion to strike inadmissible evidence constitutes a waiver of the right to later complain of its erroneous admission .... [Citation.] Parties also waive the right to later contest the admissibility of evidence where counsel fails to state the specific, correct ground or grounds

supporting the objection. [Citation.]" (*Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 865 [236 Cal.Rptr. 778].)

Given the foregoing rules, I believe it elementary that defendants were required to explain where in the record they made their objections or, in the case of a plainly erroneous instruction, where the record shows that the error complained of was plain and not one of omission under the facts of the case. (See *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574 [224 Cal.Rptr. 664, 715 P.2d 624] [plur. opn.].) The Court of Appeal is not required on remand to resolve these remaining issues on the merits if to do so means it must scour through this case's voluminous record to locate the relevant proceedings itself. (*Green v. City of Los Angeles, supra*, 40 Cal.App.3d 819, 835.)

I decline to finely parse defendants' 119-page densely printed corrected opening brief or their similarly formatted 40-page reply brief in the Court of Appeal to discover the full extent to which they did or did not support their claims of error with adequate references to the record. I believe the Court of Appeal's determination that defendants' briefing was inadequate, even after the court accommodated them by permitting corrections, deserves our deference.

Accordingly, I cannot sign the majority opinion. My decision not to do so should not be interpreted as a reflection on the merits of the majority opinion's general discussion of the relevance on appeal of special findings on damages. (Maj. opn., *ante*, pp. 1156-1157.) I merely object to the application of those principles, correct or not, to a case with the procedural posture of this one. We should dispose of the case in plaintiff's favor on procedural grounds.

On April 28, 1993, the opinion was modified to read as printed above.

APPENDIX C

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA



NICHOLAS E. TAVAGLIONE, Plaintiff and Respondent,	)	E006746
v.	)	(Super.Ct.No. R-187341)
MICHAEL C. BILLINGS, et al.,	)	
	)	**O P I N I O N**
Defendants and Appellants.	)	
	)	

APPEAL from the Superior Court of Riverside County. John P. Carroll, Judge. Affirmed.

Haight, Brown & Bonesteel, Roy G. Weatherup and Rita Gunasekaran for Defendants and Appellants.

Miller, Boyko and Bell, Roy Morrow Bell and Fletcher W. Paddison for Plaintiff and Respondent.

Michael C. Billings, Maryann Archambault, J. Richard Swartz, Roy E. Whitehead, and Riverside National Bank, defendants and appellants (hereinafter collectively referred to as defendants) appeal from the judgment in favor of Nicholas Tavaglione, plaintiff and respondent (hereinafter, plaintiff) entered following a lengthy jury trial, prosecuted by plaintiff on various tort theories of recovery, in which the jury returned a general verdict awarding plaintiff compensatory damages of

$2,254,787 against all defendants, jointly and severally, and further awarding punitive damages of $130,000 against defendant Billings and $2,300,000 against defendant Riverside National Bank.[1]

Defendants, in pursuing this appeal, raise numerous and extensive claims of error in their 119-page opening brief.[2] We conclude, as we shall explain, because the jury returned general verdicts both as to liability and damages, we need not address each of defendants' numerous and various challenges to the theories of recovery pursued by plaintiff, but instead need determine only whether any theory of recovery supports the general verdict. We further conclude, as we also shall explain, that with respect to the remaining issues raised by defendants in this appeal, defendants, with only minor exceptions, have not met their burden to demonstrate error occurred in the trial court. We shall, therefore, affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The facts underlying this appeal essentially are not in dispute.[3] The board of directors of Riverside National Bank

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[1] In accordance with the instructions contained in the "General Verdict with Special Interrogatories" submitted by the parties (discussed, in detail, below) the jury allocated the compensatory damage award among the various defendants. The trial court, recognizing liability of the defendants was joint and several corrected the verdict, accordingly.

[2] All references to defendants' opening brief are to the "Corrected" opening brief filed by defendants on February 28, 1992, in response to our order dated January 31, 1992, advising defendants of their failure to include citations to the record as required by rule 15(a) of the California Rules of Court.

[3] In view of the voluminous record on appeal, consisting of 13 volumes of Joint Appendix in Lieu of Clerk'~ Transcript and 16 volumes

(continued...)

("RNB"), of which plaintiff and the individually named defendants were members, adopted a bylaw at a special board meeting held February 26, 1987, which disqualified anyone in default for more than 30 days on a loan from any financial institution from serving on the board of director.[4] Under the terms of the bylaw, if the default for more than 30 days occurred during the term of a director, that director "shall be disqualified to continue to serve as a director . . . and such person shall be deemed to have vacated his place on the Board of Directors as of the date" of the 30-day default, however, the disqualified director "may be considered for appointment as a director at a future date which is at least one year after the default which gave rise to such disqualification has been cured."

Plaintiff, the single largest shareholder of RNB and an elected member of the board of directors since 1974, had loans from RNB which purportedly were in default for more than 30 days as of the date the board adopted the bylaw. Plaintiff allegedly was not given notice of the special meeting at which the bylaw was amended (see fn. 4, below) and, therefore, apparently was not present and did not participate in that action of the board. Pursuant to the newly adopted bylaw, the board of directors notified plaintiff, by certified letter dated February 26, 1987, that plaintiff did not meet the newly

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[3](...continued)
of Reporter's Transcripts, and because, as above noted, the underlying facts essentially are not disputed, we take our statement of facts from plaintiff's First Amended Complaint.

[4] The board of directors originally adopted the bylaw at a regularly scheduled monthly board meeting held February 18, 1987. Because of a perceived ambiguity in the language of the bylaw as initially adopted, which arguably created a 30-day period in which to cure a default, the board held a special meeting on February 25, 1987, to amend the bylaw and eliminate the purportedly ambiguous language.

adopted qualifications for board members. Therefore, the board advised plaintiff that he was disqualified to continue to serve as a directors and was "deemed to have vacated his place on the Board of Directors as of February 26, 1987."

Thereafter, in March of 1987, two articles pertaining to the board' action appeared in the local newspaper. One such article, which quoted defendant Swartz, identified in the article as RNB's executive vice president, stated, among other things, that plaintiff "was ousted from the Bank's board in late February after board members voted to remove any director who fell behind on loan payments to RNB. At the time, [plaintiff] had delinquent loans at the Bank totalling $714,405.00 according to Bank documents."[5] According to Swartz, "only plaintiff's] loan delinquencies triggered [plaintiff's] ouster" and the Board decided to change [RNB's] bylaws in February to prevent a Director who fell behind in loans from staying on the Board. Although the change resulted from [plaintiff] loans, it was not aimed at [plaintiff] alone . . . ."

At about this same time, and after his removal from the RNB board of directors, plaintiff entered into an agreement to sell his shares in RNB to Bank of Hemet (also referred to as Hemet BanCorp), allegedly for the purpose of obtaining funds necessary "to cure existing defaults and pay off certain loans" from RNB. In April 1987 defendant Billings[6] wrote a letter to RNB shareholders describing plaintiff's agreement

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[5] The "bank document" was an apparent reference to the proxy statement prepared by RNB under the signature of defendant Billings as president in anticipation of the annual shareholders meeting then scheduled for April 15, 1987.

[6] Defendant Billings not only was a board member but also was president of the bank.

with Bank of Hemet as "illegal" and "not in the best interests of" RNB.

Based on the foregoing events, plaintiff sued defendants for damages plaintiff allegedly suffered as the result of the board's various actions. Defendants' demurred to plaintiff's original complaint and after the trial court apparently sustained that demurrer while granting plaintiff leave to amend, plaintiff filed his "First Amended Complaint for Illegal Ouster of Plaintiff as a Director; Invasion of Privacy; Breach of the Covenant of Good Faith and Fair Dealing; Defamation; and Interference with Contractual Relationships.[7]

In his first cause of action for "Illegal Ouster," plaintiff alleged the bylaw adopted by defendants on February 26, 1987, violated California Corporations Code section 303 which, according to the allegations of the complaint, prohibits removal of a corporate director prior to expiration of the director's term except under certain specified circumstances, none of which pertained to plaintiff. Consequently, plaintiff alleged the board's action was unlawful and constituted an illegal "ouster" of plaintiff from the board of director. Additionally, plaintiff alleged the bylaw, by its express language, applied only to directors in default for more than 30 days after adoption of the bylaw. In immediately applying the bylaw to plaintiff, without the 30-day period, plaintiff alleged the board not only improperly adopted "an ex post facto provision," but also did not fairly apply the bylaw provision to other directors "similarly situated."

Relying on the foregoing allegations, plaintiff alleged he was denied access to board meetings and "other rights and privileges as a director of the corporation." In addition, plaintiff alleged, as a shareholder of the corporation, "that

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[7] All further references to the complaint are to plaintiff's First Amended Complaint, as identified, above.

plaintiff has been denied representation on the Bank's board." Consequently, plaintiff alleged, "As a direct and proximate cause of the illegal action of defendants, and each of them, plaintiff has been illegally ousted as a director of the corporation and denied his rights as a shareholder. Plaintiff has sustained damages in an amount to be proven at trial."

In his second cause of action for defamation, plaintiff sought compensatory damages of Sl. 5 million and $3 million in punitive damages based upon defendants' publication of the information contained in the newspaper articles, as set forth above, as well as in the proxy statement and Billings' April 1987 letter to RNB's shareholders. In addition to seeking special damages based upon alleged injury to plaintiff Business as a contractor and real estate developer, plaintiff sought general damages for injury to plaintiff's reputation in the community and plaintiff's "credit and reputation with institutional lenders." Plaintiff further alleged, "As a direct and proximate result of defendants' actions, plaintiff has been forced to sell his stock in Riverside National Bank at book value, which is an amount far less than the actual fair market value of the stock."

Plaintiff's third cause of action, entitled "Wrongful Disclosure of Confidential Information," alleged plaintiff, as a depositor and loan customer of RNB, "reposed trust and confidence in the Bank to maintain [plaintiff's] financial privacy and confidentiality of his loan transactions and records. n According to plaintiff, "Defendants, and each of them, had a duty to maintain the confidentiality and privacy of plaintiff's loan accounts with the Bank." Plaintiff further alleged, "As of February, 1987, plaintiff, or his companies, had been in default under the terms and provisions of the various loans with the Bank. In February, 1987 defendants conspired amongst each other and agreed upon a plan to utilize plaintiff's loan defaults as a pretense for ousting

plaintiff from the board of directors and thereafter publicizing plaintiff's ouster and his loan defaults in order to damage plaintiff's credit standing and thereby force plaintiff to sell his shareholders [sic] in the Bank."

Plaintiff also alleged, defendants, in furtherance of the conspiracy, adopted the bylaw, ousting plaintiff from the board of directors, and published information, both in the newspaper, as set forth above, and in the proxy statement sent to shareholders, disclosing the fact and amount of plaintiff's loan defaults. "The publication and disclosure of plaintiff's loan information violated defendants' duty to maintain the privacy and confidentiality of the statements." Plaintiff contended, "As a direct and proximate result of defendants' actions, plaintiff has been required to sell off his shares in the Bank at less than fair market value and has incurred damages in the total amount of $1.5 million." Additionally, plaintiff sought punitive damages in the amount of $3 million.

In his fourth cause of action for tortious breach of the implied covenant of good faith and fair dealing, plaintiff alleged that his status as a loan customer of RNB created a duty on the part of defendants "to deal fairly and in good faith with plaintiff in connection with his loan transactions with the Bank. Defendants had the further duty to deal fairly and in good faith with plaintiff as a shareholder in the Bank to preserve and protect plaintiff's rights as a shareholder. n Plaintiff further alleged defendants "breached the implied covenant of good faith and fair dealing by: [¶] (a) Formulating a plan and conspiracy to utilize plaintiff's loan defaults as the pretext for removing plaintiff from the board; [¶] (b) Improperly removing plaintiff as a director of the corporation in violation of Corporations Code §303(c) and thereby nullifying plaintiff's rights as a shareholder to elect directors; [¶] (c) Failing to give plaintiff an opportunity to cure his loan defaults prior to the adoption of the bylaw; [¶] (d) Utilizing

plaintiff's illegal ouster from the board as a pretense for subsequently publishing confidential and private information concerning plaintiff's loan accounts with the Bank and the defaults under these loans; and [¶] (e) Formulating and implementing this plan to force plaintiff into selling his shareholdings in the Bank."

According to plaintiff, "As a direct and proximate cause of defendants' actions, plaintiff was held up to public contempt and ridicule, plaintiff's credit relationship with the Bank was jeopardized, plaintiff's credit relations with other banks and lending institutions was [sic] adversely affected and plaintiff was forced to sell his shareholdings in the Bank in order to pay off or otherwise cure plaintiff's credit obligations to the Bank and other lending instructions [sic]." Relying on the foregoing allegations, plaintiff sought general damages of $1.5 million for the loss he allegedly incurred in selling his stock in RNB at less than fair market value and further sought punitive damages of $3 million.

Plaintiff's fifth cause of action purported to seek compensatory and punitive damages of $1.5 million and $3 million, respectively, on the tort theory of intentional interference with plaintiff's contractual relationships with RNB based upon plaintiff's status as a shareholder and borrower. In this cause of action, plaintiff alleged defendants knew of plaintiff's contractual relationships with RNB as both a shareholder and borrower and defendants intended, by their actions in removing plaintiff from the board and in publishing information regarding plaintiff's loan defaults, to interfere with plaintiff's ongoing business and economic relationships with RNB.

In his sixth cause of action, entitled "Interference with Contractual Relations and Prospective Advantage," plaintiff alleged defendants knew plaintiff had established banking and lending relationships with financial institutions other than RNB and intended, by "expelling" plaintiff from the board of

directors and publishing information regarding plaintiff's loan defaults, to interfere with plaintiff's other financial relationships. In this cause of action, plaintiff alleged entitlement to compensatory damages of $1.5 million allegedly incurred by plaintiff, as the direct and proximate result of defendants' actions, in paying off loans and curing loan defaults with these other financial institutions. Plaintiff also alleged entitlement to $3 million in punitive damages.

As his seventh and final cause of action, plaintiff alleged the actions of defendants, as set forth in the sixth cause of action, alternatively constituted negligent interference with plaintiff's contractual relationships with other financial institutions. Consequently, plaintiff alleged, "As a direct and proximate result of defendants' actions, plaintiff's banking relationships with the other lenders was [sic] disrupted, plaintiff was refused further extensions of credit, and plaintiff has been required to pay off loans with certain lenders and cure defaults on other loans with various lenders. As a direct and proximate result of defendants' actions, plaintiff has sustained damages in the amount of $1,500,000.00."

After the trial court overruled defendants' demurrer to plaintiff's amended pleading, defendants responded to the first amended complaint by filing an answer in the form of a general denial pursuant to Code of Civil Procedure section 431.30, subdivision (d). In their answer, defendants asserted 12 affirmative defenses which not only included the standard allegations (e.g., failure to state a cause of action, insufficient facts to support an award of punitive damages, estoppel, unclean hands, and failure to mitigate damages) but also included specific affirmative allegations, the details of which shall be discussed, as pertinent, below.

Ultimately, and after extensive pretrial proceedings none of which are pertinent to the issues raised in this appeal, the parties proceeded to a jury trial on each "cause of action"

of plaintiff's first amended complaint. In view of our revolution of the issues raised in this appeal, we need not recount in detail the evidence presented by plaintiff and defendants during the lengthy jury trial. Summarized briefly, plaintiff offered evidence to show that during 1986 he obtained a series of short-term, interest only loans from RNB. Each loan was fully secured and approved by defendant Billings. During 1986, the year immediately preceding the board's adoption of the bylaw pertaining to loan defaults by board members, plaintiff occasionally fell behind on monthly or quarterly interest payments on the four loans then outstanding. According to established procedure, defendant Billings routinely extended the due date for payment of the principal balance on plaintiff loans on condition only that plaintiff was current on interest payments at the time the extension was requested. Plaintiff offered his canceled checks to show plaintiff paid all interest payments due during 1986, although some of those payments arguably were late. Plaintiff also offered evidence, specifically RNB's own records, to show that RNB, apparently due to an error, did not credit plaintiff with a $4,000 loan payment plaintiff made in March 1986. Once RNB credited that $4,000 payment, plaintiff was not in default and, in fact, was current on all interest payments up through January 18, 1987. Therefore, according to plaintiff's evidence, as of February 18, 1987, when the board initially adopted the bylaw which removed plaintiff from the board of directors, plaintiff was 30 days in default on only one loan and that default occurred because defendant Billings refused to extend or renew that loan.

Plaintiff also offered evidence to show that defendants Swartz, Whitehead, Archambault and Billings met on February 4, 1987, apparently at Billings' request, in what plaintiff described as a "secret meeting" to discuss plaintiff's purported loan defaults and removal from the RNB board of directors. At that meeting, defendant Billings presented a written

summary, which Billings apparently specially prepared, of plaintiff's purported loan defaults.[8] At the February 18, 1987, board meeting, the board adopted the bylaw without discussion. Thereafter, and as above noted, the board held a special meeting on February 26, 1987, for purposes of amending the bylaw to eliminate a purported ambiguity which arguably created a 30-day period in which to cure a default. Plaintiff also presented evidence to show that at the time the board adopted the bylaw in February 1987 and later in March 1987 defendant Whitehead was in default by more than 30 days on loans from RNB and Bank of America, respectively, but RNB did not invoke the bylaw to remove Whitehead from the board of directors.

In their defense, defendants offered evidence to support their position that the board adopted the bylaw only after consultation with legal counsel and out of concern for the fiscal well-being of RNB in view of plaintiff's repeated and serious loan defaults. In other words, defendants' evidence was directed at showing the board action in adopting the bylaw was lawful and not directed solely at plaintiff. Defendant Billings testified, in part, that the bylaw was not invoked against defendant Whitehead, at least with respect to Whitehead's RNB loan, because Whitehead had the ability to repay his obligations. Therefore, Billings, as president of RNB, determined although the loan was more than 30 days overdue, Whitehead was not in default. Additional evidence presented by plaintiff and defendants at trial will be discussed, as pertinent, below.

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[8] Billings' summary of plaintiff's purported loan defaults was not produced during either pretrial discovery or trial, although plaintiff apparently requested production of that document. Plaintiff suggests the summary was destroyed, but the portions of the record cited by plaintiff do not support that suggestion.

At the completion of the 30-day trial, the jury returned a purported "general verdict with special interrogatories," awarding plaintiff $2,254,787 in compensatory damages and further finding liability in favor of plaintiff and against defendants on each purported theory of recovery alleged in plaintiff's complaint. After determining liability, and in a separate proceeding, the jury also awarded plaintiff punitive damages of $2,300,000 against RNB and $130,000 against defendant Billings.

Not surprisingly, defendants moved both for judgment notwithstanding the verdict and for new trial while plaintiff, in turn, sought to recover his costs and also, pursuant to Code of Civil Procedure section 1021.1, plaintiff's attorneys' fees. The trial court denied both of defendants' post-trial motions and awarded plaintiff costs and $254,673 in attorneys' fees.

DISCUSSION

Defendants, as noted above, raise numerous issues in pursuing this appeal. More particularly, defendants' first seven issues challenge the various purported causes of action asserted by plaintiff on the grounds that such causes of action either are not viable theories of recovery, as matters of law, or that the evidence presented at trial was insufficient to prove such causes of action. Next, defendants raise various errors purportedly committed during trial by the trial court regarding jury instructions and evidentiary rulings. Defendants' third group of issues are directed at challenging the jury's compensatory and punitive damage awards on the grounds of excessiveness, insufficiency of the evidence and unlawfulness. Defendants further contend the trial court erred in granting plaintiff's motion, pursuant to Code of Civil Procedure section 1021.1, for attorneys' fees. Finally, defendants contend the trial judge was biased in favor of plaintiff such that the "demeanor and conduct" of the trial judge, combined with the "erroneous

and prejudicial evidentiary rulings," deprived defendants of their right to a fair trial.

Our review of the various and extensive issues raised by defendants in this appeal is guided, and ultimately simplified, by the "well established [principle] that a complaint may plead different theories on which relief is sought with legal propriety. [Citations.] It is noted that here each of the counts is based upon the same allegations of fact and that there are no contradictory or antagonistic facts. [Citations.] If the plaintiff makes no election or is not otherwise estopped [citation] the election as to which cause of action is sustained is, after the taking of all the evidence, a matter for the judge or the jury. [Citation.] Where an appeal is taken from such a judgment the reviewing court has the power to disregard particular theories and findings and to affirm the judgment on a theory which is supported by the finding and evidence in order that causes may be disposed of by a single appeal and without further proceedings in the trial court. [Citations.] (Crogan v. Metz (1956) 47 Cal.2d 398, 403.) In other words, and as plaintiff points out, where as here an appeal is taken from a general verdict returned on several counts or theories of recovery, it is presumed that the jury found in favor of the prevailing party on each count or theory of recovery and the judgment must be affirmed so long as any one count or theory of recovery is supported by substantial evidence. (Henderson v. Harnischfeaer Corp. (1974) 12 Cal.3d 663, 673.)[9]

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[9] Although plaintiff, in his brief, alerted defendants to this potentially dispositive issue, defendants did not address the significance of the general verdict in their reply brief, instead apparently choosing to ignore the problem. Because plaintiff raised the issue, and we rely heavily on it in our resolution of the various contentions raised in this appeal, we are not required to afford defendants an additional opportunity to brief the significance of the general verdict.

According to the foregoing principles, it is not necessary for us to determine, as defendants implicitly contend, whether every count or theory of recovery prosecuted by plaintiff is legally valid and supports the jury's general verdicts of liability and damages. Instead, we need only determine whether any theory of recovery does so. In other words, we must affirm the judgment if we determine there is any theory of recovery which supports the judgment.[10] This principle pertains even though the measure of damages, and thus the amount of the general damage verdict, might differ under the various theories of recovery pleaded in the complaint. (Grogan v. Metz, supra, 47 Cal.2d at 404-405; Gilman v. Nemetz 91962) 203 Cal.App.2d 81, 94.)

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[10] During oral argument, defendants acknowledged the significance and effect of a general verdict but asserted such effect does not apply where, as here, instructional error has occurred. Moreover, defendants further claimed during oral argument that they pointed out this exception to the "rule" regarding general verdicts in their opening brief at pages 49 through 50 as evidenced by their citation to Seaman's Direct Buying Service, Inc. v. Standard Oil Co., (1984) 36 Cal.3d 752, for principle that, "'If it appears that error in giving an improper instruction was likely to mislead the jury and thus to become a factor in its verdict, it is prejudicial and ground for reversal.'" (Id. at p. 767.) Both of defendants' assertions, in our view, are disingenuous absent a showing by defendants that improper instructions were given which were likely to mislead the jury with respect to each of the theories of recovery alleged in plaintiff's complaint and pursued at trial. In this respect, defendant citation to Seaman's is particularly telling because that citation occurred in the specific context of defendants addressing instructional error in connection with the first cause of action for "illegal ouster." Although defendants argued such error affected each of plaintiff's theories of recovery because "plaintiff" other causes of action all flow from this central allegation of `illegal ouster,'" defendants' failed to demonstrate that such, in fact, was the case. We conclude, as we shall discuss, plaintiff's defamation theory of recovery was unaffected by any claimed instructional error and thus supports the general verdict.

Our task in this regard is made easier by the jury's responses to the special interrogatories included with the general verdict form. Those responses reveal the jury found defendants liable to plaintiff under each theory of recovery plaintiff alleged in his complaint and pursued at trial and further found in connection with each theory of recovery that defendants RNB and Billings acted with malice. Consequently, the foregoing special interrogatories enable us to avoid the detailed analysis required when the jury returns only a general verdict on various theories of recovery. We know, from the foregoing responses, that the jury found liability and malice in connection with each theory pursued by plaintiff at trial.

The remaining special interrogatories included with the general verdict asked the jury to find . . . the total amount of damages suffered by plaintiffs in connection with each theory of recovery. The general verdict form also instructed the jury, "In totaling compensatory damages, you may (or may not) find that plaintiff is entitled to the same damages under separate theories of recovery. Set forth all of the damages under each subpart on pages 4 through 8. In totaling any damagessto awarded on page 3[the damage general verdict] total all such damages but do not add any specific element of damages more than once." In responding to the purported special interrogatories regarding damages, the jury attributed varying monetary figures to each theory of recovery. Only the damage amount attributed to the first "cause of action" for "illegal ouster" actually equates to the total general verdict damage award.

"The purpose of special interrogatories is . . . . to test the validity of the general verdict by determining whether all of the facts essential to the support of the general verdict were established to the satisfaction of the jury." (7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 323, p. 324.) While the special interrogatories regarding liability and malice clearly serve this function, the interrogatories" pertaining to damages

do not. In fact, we are unable to comprehend the function or import of the special interrogatories regarding damage. Possible explanations for these interrogatories are: (1) the parties assumed each theory of recovery pursued by plaintiff constituted a separate cause of action entitling plaintiff to independent recovery; (2) certain of plaintiff's claimed injuries were compensable under some but not all theories of recovery; and/or (3) the parties wanted to ensure the jury did not compensate plaintiff more than once for any claimed item or "element" of damage.[11]

With respect to the first possible explanation, plaintiff's complaint, in our view, did not allege separate causes of action which would independently support separate damage awards but instead alleged one cause of action, framed in separate counts, asserting various theories of recovery based upon the same operative facts. (See Barrett v. Superior Court (1990) 222 Cal.App.3d 1176, 1181-1182.) Moreover, it appears the parties did not propound the special interrogatories for the purpose of identifying damage suffered by plaintiff under separate causes of action. If that had been the parties' objective, and therefore the purpose of the special interrogatories in question, the verdict form would have instructed the jury to total all damages awarded under each cause of action in arriving at their ultimate general damage verdict. In other words, plaintiff would be entitled to recover an amount significantly greater than that actually awarded by the jury.

With respect to the second possible explanation, the jury was instructed that the measure of damage under each theory of recovery was the same, i.e., all damage proximately (or legally) caused by defendants' wrongful acts. The jury was

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[11] The record reveals plaintiff prepared the general verdict with special interrogatories and defendants "agreed" the form was "correct". Therefore, defendants have waived any claim of error in this connection.

not instructed that certain items (or to use the parties' term, "elements") of damage were recoverable under some but not all causes of action. Equally significant is the fact that the parties did not define the term "element of damage" for the jury. In other words, according to the jury instructions, plaintiff was entitled to recover the same amount of damages under any theory alleged and proved at trial.

The third possible explanation appears the most likely. However, this explanation does not comport with the fact-finding function of special interrogatories, as noted above. If the parties wanted to ensure plaintiff did not receive double recovery for any item or element of damage, a simple instruction to that effect would have sufficed.

Consequently, and for each of the foregoing reasons, we conclude the special interrogatories on damages serve no readily identifiable, proper function in that they do not test the validity of the general verdict by revealing the jury found all facts necessary to establish liability under plaintiff's various theories of recovery. In short, we are not constrained by the damage special interrogatories in resolving the issues raised in this appeal because those interrogatories are meaningless and therefore irrelevant.

Relying on the authority discussed previously, above, we conclude, for reasons we shall explain, that the general verdicts of liability and damage are supported by plaintiff's defamation count. Consequently, we need not address each of defendants' 17 claims of error but instead shall limit our review to those claims which relate directly or indirectly to the "cause of action" for defamation. Accordingly, the contentions asserted by defendants pertinent either directly or indirectly to the defamation count or theory of recovery and which we, therefore, must resolve in this appeal are as follows:

(1) Were the facts contained in the various alleged defamatory statements attributed to defendants matters of

public concern such that plaintiff had the burden to prove falsity of those facts as well as defendants' fault, and, if so, did plaintiff meet that burden?

(2) Was plaintiff a public figure such that the trial court erred in failing to instruct the jury that in order to return a verdict in favor of plaintiff on the defamation theory of recovery the jury must find defendants published the statements in question with knowledge of their falsity or reckless disregard for the truth?

(3) Was there sufficient evidence to establish that defendants' wrongful conduct was the proximate cause of the various items of damage claimed by plaintiff?

(4) Was the award of compensatory damages excessive as a matter of law?

(5) Did the trial court adequately instruct the jury on plaintiff's duty to mitigate his damages?

(6) Was the punitive damage award improper, first, because defendant RNB, as an instrumentality of the federal government, was immune from liability for such damages, second, because evidence supported defendants' assertion that they relied on advice of counsel and therefore did not act with malice and, finally, because the award was excessive and therefore constituted a "taking of property without due process of law?"

(7) Were defendants denied a fair trial as the result of the trial court's erroneous and prejudicial evidentiary rulings and the trial court's purported bias in favor of plaintiff as evidenced by the trial court's demeanor and conduct?

(8) Did defendants act reasonably in rejecting plaintiff's pretrial offer for judgment under Code of Civil Procedure section 998, such that the trial court erred in awarding plaintiff attorneys' fees under Code of Civil procedure section 1021.1?

We are able further to reduce the issues we must address in this appeal by noting defendants' near-total failure to demonstrate that the issues asserted on appeal first were raised by defendants in the trial court. In other words, because the "party challenging a judgment has the burden of showing reversible error by an adequate record" (Ballard V. Uribe (1986) 41 Cal.3d 564, 574) defendants' claims of error must include appropriate citations to the record showing where the purported error occurred, and if appropriate, that defendants objected to that error in the proceeding below. Defendants, by failing in their opening and reply briefs to provide anything other than cursory citations to the joint appendix in lieu of clerk's transcript or to the reporter' transcript, have failed, almost without exception, to demonstrate error occurred in the trial court. In failing adequately to cite the record, defendants either misperceive the function of appellate review[12] or would have us assume the purported error was raised somewhere in the trial court and can be found by reviewing the voluminous joint appendix and reporter's transcript. Whatever the possible explanation, defendants generally have not set their burden to demonstrate error occurred in the lower court proceeding.

Defendants' oversight would be troublesome in a case which involved only a relatively small trial court record. The record here, however, is formidable, to say the least, and consists of over 4,000 pages of joint appendix and 3,349 pages

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[12] In this regard, we note defendants apparently do misunderstand the function of an appellate court, at least with respect to reviewing the sufficiency of the evidence, as reflected in their response to plaintiff's assertion that defendants, in this connection, set out only evidence favorable to the defense. Defendants retort, in pertinent part, that the settled rule . . . in measuring the sufficiency of the evidence," is that "this court must review the entire record on appeal." Defendants' assertion is incorrect, as we discuss in detail, below, to the extent it suggests we must read the entire record to determine what evidence was presented.

of reporter's transcript. Assuming defendants were aware of their burden on appeal to demonstrate that defendants complained of the purported error in the trial court, we can only interpret defendants' failure to include appropriate citations to the record as an implicit invitation to this court to ferret out the error ourselves. We decline defendants' invitation. To the extent we are unable to ascertain from defendants' briefs whether defendants first raised a particular claim of error in the trial court, we either shall not address that issue, because the error has not been preserved for review on appeal, or we shall address the issue according to our interpretation of the manner in which the error may have occurred in the trial court.[13]

Accordingly, we begin our discussion with defendants' assertion that the facts contained in the various alleged defamatory publications attributed to defendants were matters of public concern therefore, in order to establish liability for defendants' purported defamation, plaintiff had the burden to prove falsity of the facts as well as defendants' fault in

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[13] We anticipate defendants will complain that we did not point out this oversight when, as earlier noted, we directed defendants to supplement specific portions of their opening brief with appropriate citations to the record. Frankly, we did not realize at the time we issued that order that defendants' inadequate citation to the record extended beyond defendants' failure to provide citations in support of factual assertions and included near total failure to provide citations to support defendants' various and numerous claims of error. However, this latter oversight is one which should be understood by any party pursuing an appeal. Moreover, our order directing defendants to supplement their brief with appropriate citations to the record was issued as an accommodation to defendants. In other words, we were not required to notify defendants of their oversight in either respect, therefore, defendants may not be heard to complain.

publishing the statements.[14] Resolution of this issue requires us to address facts and legal principles which are also pertinent to resolution of defendants' contention, denominated above as issue number two, that plaintiff was a public figure, therefore, in order to establish liability or, alternatively, to recover punitive damages, plaintiff was required to prove defendants made the allegedly defamatory statements either knowing the statements were false or with reckless disregard for the truth. Because these two contentions are related, we shall address them both in this portion of our discussion.

1. DEFENDANTS' CHALLENGES TO PLAINTIFF'S DEFAMATION CAUSE OF ACTION

In raising their initial contention that defendants' allegedly defamatory statements pertained to matters of public concern, therefore, plaintiff had the burden to prove both falsity and fault, defendants have failed to demonstrate whether and if so how that issue was raised by defendants in the trial court. In their discussion of this contention,

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[14] Defendants' characterization of this issue, as set out in the caption which precedes defendants' discussion, is that "plaintiff has neither pleaded nor proved any cause of action for defamation since truth is an absolute defense and there can be no liability for unfavorable interpretation of the facts by others. Despite the caption, defendants do not discuss, least of all cite, the purported pleading defects. Moreover, such defects are irrelevant unless raised in the trial court prior to trial. Defendants do not indicate in their discussion whether they challenged plaintiff's pleadings, and if so on what basis. Absent such a challenge, defendants waive any pleading defect and are limited to attacking the sufficiency of the evidence to prove the elements of the cause of action. The elements of the cause of action, in turn, are defined in the jury instructions given by the trial court. Therefore, defendants may challenge the instructions if objections timely were asserted in the trial court. Because defendants' discussion does not mention the pleadings or jury instructions, but instead focuses on the sufficiency of the evidence, we shall focus our discussion, accordingly.

defendants' only reference to the trial transcript occurs in the context of reciting evidence offered by plaintiff to prove falsity of the purportedly defamatory statements in question. Consequently, we initially assumed the trial court instructed the jury regarding plaintiff's purported burden of proof and defendants' contention in this regard amounted to an attack on the sufficiency of the evidence to prove falsity of the statements. Upon reviewing the record, however, we ascertained that the trial court did not give the jury such instruction, but instead instructed the jury, apparently at defendants' request, that, "A publication in a newspaper regarding a private citizen may be privileged if it is a matter of public interest to the residents of that community, and only published within that community. A publication is of public interest if its appeal is not merely a matter of gossip or idle curiosity but deals with substantial matters affecting the general public such as the prevention of crime and the apprehension of criminals, the obtaining of relief from socially recognized evils, or the criticism of work performed by contractors paid from public funds. The privilege cannot be defeated if there was a `bona fide purpose to give the public the benefit of comment which it is entitled to have, rather than for any ulterior motive of causing harm to the plaintiff.' "[15]

Because the jury was not instructed that plaintiff had the burden to prove both falsity and fault, and further, because defendants do not suggest, either explicitly or by implication, that they requested such an instruction which the trial court

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[15] Although the foregoing jury instruction includes quoted language, the instruction included in the record does not identify the authority for the quotation. Moreover, although there is no indication on the instruction to identify defendants as the requesting parties, defendants acknowledged in both their motion for judgment notwithstanding the verdict and motion for new trial, that the trial court gave the instruction at defendants' request.

refused to give or that defendants otherwise raised this issue in the trial court, we need not and, therefore, shall not address defendants' initial claim of error. Stated bluntly, defendants have not demonstrated the issue was raised in the trial court and thereby preserved for review on appeal.

Defendants next contend, in connection with the defamation cause of action, that the trial court gave erroneous and incomplete instructions to the jury. Despite the contrary suggestion, defendant's discussion of this issue focuses exclusively on the trial court's refusal to instruct the jury on constitutional "actual malice" according to BAJI No. 7.04 which, as requested by defendants, would have instructed the jury, in pertinent part, that "A published statement about a public figure is absolutely privileged, even if false and untrue, unless the publication was made by the defendant with knowledge that it was false or with a reckless disregard for the truth."

Defendants raise two contentions in this regard. First, defendants contend the evidence presented at trial established plaintiff was a public figure or, at the very least, a limited purpose public figure, as defined in Gertz v. Robert Welch, Inc. (1984) 418 U.S. 323. Therefore, defendants argue, plaintiff was required to prove actual malice in order to establish defendants' liability for the alleged defamation and the trial court erred by refusing to instruct the jury in this regard. Alternatively, defendants contend that "[t]he settled law in this country is that no defamation plaintiff is entitled to punitive damages unless he can show that the defendant published the offensive statements with knowing falsity or with reckless disregard for the truth," therefore, the trial court erred in permitting the jury to award punitive damages without proof of actual malice.

In discussing these contentions, defendants correctly point out, with appropriate citations to the record, that the trial

court refused to give BAJI No. 7.04 as requested by defendants. Instead, the trial court instructed the jury, as pertinent to this issue, "If you conclude that defendant published a libel of plaintiff with actual malice, then in your discretion you may determine whether or not to award plaintiff punitive damages."[16] The trial court further instructed the jury according to BAJI No. 14.71[17] on "malice" necessary to support an award of punitive damages.

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[16] The record discloses that the foregoing instruction apparently is a modification of BAJI No. 7.12. The use note Accompanying BAJI No. 7.12 reflects that the instruction "should be used only in cases which are filed under Civil Code, § 48a [pertaining to defamation actions against media defendants], and if punitive damages are sought in other libel/slander cases the court should use BAJI 14.71 [general instruction on recovery and measure of punitive damages]." (See BAJI No. 7.12 (7th ed. 1986) p. 279, and related 1992 pocket part, pp. 106-107.) Because defendants are not members of the media, the trial court erred in giving this instruction. The correct instruction, as we shall explain, is BAJI No. 14.71, the general punitive damage instruction which requires and defines "malice," rather than actual malice."

[17] As given by the trial court, BAJI No. 14.71 provides, in pertinent part, that, "If you find that plaintiff suffered damage as a legal result of the conduct of defendant on which you base a finding of liability, you may then consider whether you should award punitive damages against defendants for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by clear and convincing evidence that said defendant was guilty of oppression or malice in the conduct on which you base your finding of liability. `Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried [on] by the defendant with a willful and conscious disregard for the rights or safety of others. A person acts with conscious disregard of the rights or safety of others when he or she is aware of the probable dangerous consequences of his or her conduct and willfully and deliberately fails to avoid those consequences. . . . [¶] `Despicable conduct' is conduct which is so vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people.

Defendants, as above noted, contend the trial court erred in refusing to give BAJI No. 7.04 regarding constitutional malice because plaintiff was a public figure. The general principles which govern resolution of this issue are well known and discussed thoroughly in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749. Simply stated, where the purportedly defamatory statement pertains to a public issue and the plaintiff is a public official or public figure, First Amendment free speech interests require that the defamation plaintiff prove not only that the statements are false but also that the statements were made with actual malice, i.e., knowledge of their falsity or reckless disregard for whether the statement was or was not false. (Id. at p. 755, citing New York Times Co v. Sullivan (1964) 376 U.S. 254, and Curtis Publishing Co. v. Butts (1967) 388 U.S. 130.) Where the allegedly defamatory statement pertains to a matter of public concern, but the plaintiff is neither a public official nor public figure, First Amendment interests, although less significant, nevertheless preclude states from allowing plaintiffs to recover "presumed or punitive damages absent a showing of 'actual malice.' " (Dun & Bradstreet Inc. v. Greenmoss Builders, Inc., supra, 472 U.S. at p. 756, citing Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323.) Where the allegedly defamatory statements do not involve matters of public concern and the plaintiff is neither a public official nor public figure, First Amendment concerns are minimal and the "state interest in providing remedies for defamation . . . adequately support awards of presumed and punitive damages -- even absent a showing of `actual malice.' [Fn. omitted.]" (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra, 472 U.S. at p. 761.) Finally, the question of whether the foregoing constitutional protections apply in any given case is

one of law. (Connick v. Myers (1983) 461 U.S. 138, 148, fn. 7.)[18]

With the foregoing general principles in mind, we turn to those principles specifically pertinent to determining, as a question of law, whether plaintiff, as defendants contend, was a public figure and as such was required to prove actual malice. Here again, the specific principles which guide our analysis are discussed thoroughly by the California Supreme Court in Reader's Digest Assn. v. Superior Court (1984) 37 Cal.3d 244, where the Court noted that in Gertz v. Robert Welch, Inc., the United States Supreme Court "defined two classes of public figures. The first is the 'all purpose' public figure who has 'achiev[ed] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.' The second category is that of the 'limited purpose' or 'vortex' public figure, an individual who 'voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.' [Citation.] Unlike the 'all purpose' public figure, the 'limited purpose' public figure loses certain protection for his reputation only to the extent that the allegedly defamatory communication relates to his role in a public controversy." (Reader's Digest Assn. v. Superior Court, supra, 37 Cal.3d at pp. 253-254, citing Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 351.)

According to the foregoing principles, and contrary to defendants' contention, we conclude, as a matter of law, that plaintiff was neither an all purpose nor limited purpose public

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[18] Defendants, in discussing this issue, also complain that the trial court refused their requested jury instruction which identified the circumstances under which a person may become a public figure. Because the determination of the plaintiff's status as a public figure is a question of law, rather than fact, we conclude the trial court correctly refused defendants' instruction on that issue.

figure. Defendants apparently contend plaintiff was an all purpose public figure as evidenced by the trial testimony of plaintiff' own witnesses that in Riverside plaintiff's name was a "household word" and even before plaintiff "ceased to be a member" of RNB's board of directors, plaintiff's "affairs" received press coverage.[19] In our view, the evidence relied on by defendants does not meet the standard enunciated by the Supreme Court in Gertz which requires "clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society" before "an . . . individual is] . . . deemed a public personality for all aspects of his life." (Gertz v. Robert Welch, Inc., supra, 418 U.S. at p. 352.) Absent such evidence, "It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." (Ibid.)

Our analysis and discussion of whether plaintiff was a limited purpose public figure, i.e., in the context of the specific controversy in which the defamation occurred, is guided by the observations of the California Supreme Court in Reader's Digest Assn. v. Superior Court, supra, "that a person should not be considered a 'public figure' solely because that person . . . is a criminal defendant [citation]; has sought certain relief through the courts [citation]; or merely happens to be involved in a controversy that is newsworthy [citation]. Rather, as this court recognized in Vegod Corp. v. American

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[19] Defendants also point to testimony from various of plaintiff's witnesses, some of whom apparently worked for plaintiff as subcontractors, that the publicity regarding plaintiff's ouster from the board of directors was so pervasive (1) their children were taunted at school as a result of the press reports and (2) the news articles affected the opinion of plaintiff held by several witnesses. This evidence, in our view, undermines rather than supports defendants' position.

Broadcasting Companies, Inc. (1979) 25 Cal.3d 763 . . . , a 'public figure' plaintiff must have undertaken some *voluntary* act through which he seeks to influence the resolution of the public issues involved. [Fn. omitted.] As such, the mere involvement of a person in a matter which the media deems to be of interest to the public does not, in and of itself, require that such a person become a public figure for the purpose of subsequent libel action. [Original emphasis.]" (Reader's Digest Assn. v. Superior Court, supra, 37 Cal.3d at p. 254.)

The evidence relied on by defendants to support their contention plaintiff was a limited purpose public figure does not establish that the controversy in question involved public issues, least of all that plaintiff voluntarily injected himself into the fray for the purpose of influencing such issues. More particularly, defendants first point to evidence that plaintiff's "ouster" from the board of RNB wa a matter of "considerable interest in Riverside County" and the "incident was so newsworthy that children of plaintiff's subcontractors were allegedly taunted at school based on the press reports." Next, defendants contend plaintiff "voluntarily injected himself into the controversy" as evidenced by the fact and content of plaintiff's interviews by the press. In our view, that evidence establishes only that the local newspaper considered plaintiff's "ouster" from the board to be newsworthy and to that end contacted plaintiff and defendants for information and comments. In short, defendants' evidence demonstrates only that as a result of press interest and coverage, plaintiff's removal from the board of directors based upon plaintiff's purported loan delinquencies became a public controversy. Such evidence, as noted above in Readers Digest Assn. v. Superior Court, is insufficient to establish plaintiff became a public figure for purposes of that controversy.

According to Reader's Digest, a plaintiff does not become a limited purpose public figure, and therefore required

to prove actual malice, merely by being involved in a controversy which receives press coverage. The controversy must be one which involves "public issues." In other words, the controversy must involve a matter of legitimate public concern. In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., the United States Supreme Court "held that '[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record.' [Citation.]" (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra, 472 U.S. at p. 761.)

Looking at the content, form and context of defendants' statements, as reported in the newspaper, we conclude plaintiff's removal from the board of directors of RNB and the details of plaintiff's purported loan defaults were not matters of public concern.[20] The public, or more particularly the local community in which the controversy occurred, had no power to influence the outcome of the controversy. The decision to remove plaintiff from the board of directors and the power to effect that decision rested exclusively with the board members.[21] No discussion or debate among members of the public was necessary and in fact, the bylaw amending the qualifica-

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[20] Arguably, plaintiff's removal from the board of directors based on his purported loan defaults was a matter of legitimate concern to RNB shareholders. Because defendants do not discuss this concern and further because plaintiff introduced evidence regarding four separate allegedly defamatory statements, proof of any one of which would support recovery, we shall not address the statements contained in the proxy statement.

[21] Throughout their brief, defendants use various euphemisms to describe plaintiff's departure from the board of directors. We decline to engage in such fiction and describe that event as plaintiff's removal from the board pursuant to the board's adoption of the now well-described bylaw.

tions for board members specifically precluded specified members of the public, i.e., shareholders, from in any way circumventing plaintiff's removal from the board. Moreover, the content of defendants' statements, which included not only the fact of plaintiff's removal from the board but also the specific details of plaintiff's purported loan defaults, went well beyond any arguable interest the public might have had in the controversy.

Arguably, defendants had an interest in publicly commenting on plaintiff's removal and purported loan defaults in view of RNB's apparent dependence on the local community for its depositors and customers. In other words, RNB legitimately might be concerned that the controversy, and attendant publicity, surrounding plaintiff's removal from the board due to alleged significant loan defaults could undermine trust and confidence in RNB among its customers and potential customers, most of whom presumably resided in the local community. Defendants' concerns in this regard do not elevate an otherwise private dispute to a controversy involving public issues. In short, we conclude here, as with the credit report at issue in Dun & Bradstreet, that defendants' statements to the press involved "speech solely in the individual interest of the speaker and its specific business audience. . . . This particular interest warrants no special protection when -- as in this case -- the speech is wholly false and clearly damaging to the victim's business reputation. . . ." (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra, 472 U.S. at p. 762.) Accordingly, we conclude plaintiff was not a public figure, either for all purposes or for purposes of this controversy. Therefore, the trial court did not err in refusing to give BAJI No. 7.04, or any other instruction requested by defendants, regarding constitutional malice.

We also reject defendants' contention, as above noted, that punitive damages may never be recovered in a defamation

action absent proof of actual malice, therefore the trial court erred in refusing to instruct the jury in this regard. Defendants' assertion is an incorrect statement of law. As previously discussed, above, the Supreme court held in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra, that proof of actual malice is not required in a defamation action by a private person against a non-media defendant where th defamatory statements do not pertain to matter of public concern. Under such circumstances, presumed and punitive damages may be recovered without proof of actual malice. (Dun & Bradstreet, Inc. v.Greenmoss Builders, Inc., supra, 472 U.S. at 763.)

We have concluded, as discussed previously, that plaintiff in the context of the defamation action, was not a public figure for all purposes. We have further concluded because the defamatory statements did not relate to matters of public concern, plaintiff was not a limited purpose public figure. Although actual malice must be proved under Civil Code section 48a (see fn. 16, supra), defendants clearly are not members of the media. Consequently, in order to recover punitive damages, plaintiff must prove malice as defined in Civil Code section 3294. The trial court, as noted above, instructed the jury on both the requirement and definition of malice as used in Civil Code section 3294 by giving BAJI No. 14.71. Accordingly, we conclude, to the extent challenged by defendants, the trial court's jury instructions in connection with the defamation cause of action properly were given.

Defendants' final challenge to the defamation cause of action, albeit raised by defendants in the connection with their assertion that the compensatory damage award was excessive as matter of law, is that "plaintiff did not meet his burden of establishing the falsity of any statement attributed to defendants. n As we have previously discussed, in detail, because the publications in question did not involve matters of public concern and because plaintiff was not a public figure, plaintiff

was not required to prove falsity of the statements. Stated otherwise, "The burden of proof with respect to the issue of truth or falsity is on the defendant." (Brown v. Kelly Broadcasting Co., (1989) 48 Cal.3d 711, 753, fn. 37, quoting Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal.2d 224, 233.) The trial court properly instructed the jury in this regard.

Because defendants steadfastly have adhered to the assertion that plaintiff had the burden to prove falsity, they do not address the question of whether their evidence proved the truth of each of the four defamatory statements in question. In order to dispel any suggestion that defendants may have met their burden in this regard we briefly shall review the pertinent evidence.

We begin our discussion in this regard with the well - established principle that "a reviewing court must start with the presumption that the record contains evidence to sustain every finding of fact; the appellant must demonstrate that there is no substantial evidence to support the challenged findings; one contending the evidence does not support some particular issue of fact must set forth in his brief all the material evidence bearing upon that issue and not merely the evidence favorable to him; failure to so state the evidence shall be deemed a waiver of the claimed error. [Citations.] [Original emphasis." (Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co. (1977) 66 Cal.App.3d 101, 152.)

Although defendants did not directly and expressly discuss the evidence pertinent to the defense of truth, they did so by implication in their misguided challenge to the sufficiency of plaintiff's evidence to prove falsity. In so doing, defendants did not comply with the foregoing obligation and established only that there was a conflict in the evidence. "The test of course, is not whether there is a substantial conflict in the evidence but whether there is substantial evidence in favor

of the respondent. [Citations.]" (Crogan v. Metz, supra, 47 Cal.2d at p. 404.) For this reason, we conclude defendants have failed to overcome the presumption on appeal that the record contains evidence sufficient to support every factual determination essential to the underlying judgment which includes the finding, implicit in the jury's determination of liability under plaintiff's defamation theory, that defendants did not prove the truth of each of the defamatory statements.

Moreover, we conclude substantial evidence supports the jury's implied finding that some, if not all, of the publications attributed to defendants were false. Defendants acknowledge that plaintiff's defamation cause of action was based upon four allegedly defamatory publications -- the two March 1987 newspaper articles, the March 1986 [sic] proxy statement And the April 1987 letter from Billings to the shareholders. At trial, plaintiff sought to prove the two newspaper articles and the proxy statement were false because all three publications wrongly stated both the fact and amount of plaintiff's purported loan defaults. To that end, and as above noted, plaintiff presented evidence to show his loan history with RNB consisted of a series of short-term, interest only loans, the majority of which were commercial. RNB, through Billings, the president of RNB, approved all loans to members of the board of directors, and routinely rolled-over plaintiff's loans so long as plaintiff was current on monthly or quarterly interest payments. Plaintiff's loans were all secured with adequate collateral. Plaintiff offered evidence, consisting of his canceled checks to prove that during all of 1986 plaintiff was current on loan interest payments.

Defendants, through the testimony of Richard Larson, the credit administrator of RNB at the time pertinent to the issues raised at trial, attempted to refute plaintiff's evidence that his interest payments were current during 1986, the period arguably in question at trial. According to the evidence, during

1986, plaintiff had four loans outstanding from RNB. It was developed through Larson's testimony and RNB's own records that due to an apparent accounting error by RNB, plaintiff was not credited with a $4,000 interest payment made in March 1986. As a result of that error, defendants erroneously concluded plaintiff was in default on various loans when, in fact, he was not. According to defendants' own records, as of December 31, 1986, plaintiff was current in payments on two of the four loans and was delinquent on one month of interest payments on the other two. The combined delinquent interest payments on those two loans totalled approximately $3,500, less than the amount of the plaintiff's uncredited $4,000 payment.[22] Because Billings, contrary to established procedure, did not renew or extend plaintiff's then outstanding loan, the principal balance was also due and owing.

The foregoing, in our view, constitutes substantial evidence to support the jury's implied finding that plaintiff was not in default on any loans, least of all on $715,000 in loans, as stated in the two newspaper articles and the proxy statement. In other words, defendants did not meet their burden to prove the foregoing statements were true. Accordingly, we conclude substantial evidence supports the jury's implied determination that the statements attributed to defendants contained in the two newspaper articles and the proxy statement were false. That implied finding is sufficient to establish liability of defendants under the defamation cause of action. Therefore, we need not address Billings' letter to the shareholders.

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[22] Defendants further emphasized the falsity of defendants' various statements regarding plaintiff's purported loan defaults as reported in the newspaper and contained in the proxy statement when Larson, apparently from the witness stand and during his testimony, presented plaintiff with a check from RNB for plaintiff's loan overpayment.

In summary, we conclude the jury's general verdict is supported by the jury's finding of liability under the defamation theory of recovery. To the extent defendants challenge that theory, we conclude, as discussed above, that each of defendants' contentions lack merit. This conclusion, as we have previously discussed obviates the need to determine whether other theories of recovery pleaded and proved by plaintiff also support the general verdict.

The remaining issues raised by defendants in this appeal, as noted above, are directed at attacking, first, the fairness of the trial, next, the general and punitive damage verdicts and, finally, the trial court's action in granting plaintiff's motion for an award of attorneys' fees. We address each of these contentions in the remaining portion of this opinion.

2. COMPENSATORY DAMAGE AWARD

We begin our discussion with defendants' contention, which we designated, above, as issue number three, that there was insufficient evidence to prove defendants' wrongful conduct was the proximate cause of the various items of damage claimed by plaintiff at trial. Despite defendants' broad description of the issue, defendants' discussion focuses on the jury's purported award of damages allegedly incurred by plaintiff as the result of plaintiff's asserted "forced sale" of his RNB stock.[23]

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[23] Defendants also purport, in a single concluding paragraph devoid both of citations to the record and discussion, to challenge the causal connection between defendants' conduct and "any of the other damages incurred by plaintiff's specifically, plaintiff's purported loss of construction business and loss of ability to obtain loans and credit from financial institutions other than RNB. In view of our resolution of defendants' proximate cause contention, it is unnecessary for us to address this final, conclusory assertion.

A. **Proximate Cause**

We admit to some difficulty in discerning the precise nature of defendants' proximate cause contention. Defendants, as above noted, initially assert there was "insufficient proof" of proximate cause to establish liability on the part of defendants for the loss or damage plaintiff purportedly incurred as the result of the forced sale of his RNB stock, causation being "a critical element of any tort action." Thus, defendants begin their discussion by suggesting the problem is one of proof to establish an essential factual element. However, in the same paragraph, defendants conclude, with citation to authority, that, "California courts have stated emphatically that proximate cause is always in the first instance a question of law.[24] In short, we cannot determine clearly whether defendants contend, as a matter of law, that defendants' conduct was not the proximate cause of the loss plaintiff claimed to have suffered in selling his RNB stock or whether defendants challenge the sufficiency of the evidence to prove legal or proximate cause.

In either case, defendants' contention is unavailing. In this regard we note defendants again have not provided citations to the record to disclose whether and if so in what

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[24] Whitcombe v. County of Yolo (1977) 73 Cal.App.3d 698, cited by defendants as authority for the above-noted quotation, does in fact include the quoted language. Id. at p. 707.) However, Whitcombe supports the quotation with a citation to Golden v. Dungan (1971) 20 Cal.App.3d 295 which holds, "The question of causation . . . is one to be determined on the evidence. 'Proximate cause is legal cause, as distinguished from the layman's notion of actual cause, and is always in the first instance, a question of law. . . . It becomes a question of fact when conflicting inferences or conclusions can be drawn from the evidence within the area of proximate cause as legally defined. [Citations.]" (Id. at p. 311.) While defendants also cite Golden, they apparently did not review the case for had they done so they would have recognized that proximate cause in the present context is a factual determination.

manner this issue was raised in the trial court. We have determined from our review of the record on appeal that defendants, in both their motions for judgment notwithstanding the verdict and new trial, argued the insufficiency of the evidence to prove defendants' conduct was the proximate cause of plaintiff's damage. In addition, prior to trial, defendants moved to exclude evidence of the value of plaintiff's stock at the time of the purported sale. That motion, however, was based on asserted pretrial discovery abuses by plaintiff and thus effectively constituted a request for sanctions based upon plaintiff's purported failure to disclose fully prior to trial the damage plaintiff claimed as the result of such sale. In other words, the record reveals defendants did not assert in the trial court the latter contention pertaining to proximate cause as a matter of law. Therefore, defendants have not preserved that contention for review on appeal.

Defendants, as noted above, did assert in the trial court the former contention regarding insufficiency of the evidence to prove proximate cause and arguably have preserved that assertion for review on appeal. The problem here, however, lies not in defendants' failure to preserve the issue for appellate review but rather in defendants' apparent failure to appreciate the significance of the jury's general damage verdict. Simply stated, we cannot determine either from the fact or amount of the general damage verdict, or for that matter from the special interrogatories[25], whether the jury awarded plaintiff compensation for the loss plaintiff claimed

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[25] The special interrogatories pertinent to damages, as set forth above, asked the jury to determine the total amount of damage plaintiff suffered under each purported cause of action or theory of recovery. In calculating those damages, the jury was not asked to determine whether defendants' conduct was the proximate cause of specific items of damage requested by plaintiff. Thus, the special interrogatories on damages reveal nothing more than the jury's mathematical calculations.

to have suffered as the result of the forced sale of his RNB stock. In other words, defendants' contention is based purely on speculation. Because neither the general damage verdict nor the special interrogatories identify the specific items of damage the jury included in their damage award, defendants are limited to challenging that award solely on the basis of excessiveness. Accordingly, we next address defendants' contention that the compensatory damage award was excessive as a matter of law.

B. Excessiveness of Compensatory Damage Award

Defendants, as set forth above as issue number four, contend the compensatory damage award was excessive as a matter of law. In raising this contention, defendants again overlook the significance of the general damage verdict and instead focus on the insufficiency of the evidence to establish the individual items or elements of damage plaintiff sought to recover at trial. As we pointed out, above, we cannot determine, either from the general damage verdict or the special interrogatories, the specific items of damage the jury included in their total compensatory damage award.

Moreover, and as previously discussed, because the jury returned a general verdict on liability, we must affirm the judgment if the verdict is supported under any theory of recovery plaintiff pursued at trial. We have concluded, as discussed at length above, the liability verdict is supported by the defamation theory, based on our rejection of defendants' challenges to that count. We similarly conclude, as we shall discuss, that the general damage verdict is supported by the defamation count and thus shall address defendants' contentions regarding excessiveness only as pertinent thereto.

" 'In considering whether the [award was] excessive, we realize the very familiar rule that to the jury, to a very large extent, is committed the responsibility of awarding

compensation for an injury sustained. When the award as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice, the duty is then imposed upon the reviewing court to act.' [Citation.]" (Cunningham v. Simpson (1969) 1 Cal.3d 301, 308-309.)

With the foregoing general principle in mind, we first note that the damages recoverable by plaintiff for defamation include both special and general damages. More particularly, and as the trial court instructed the jury, if the libelous statements attributed to defendants were defamatory on their face, then plaintiff was entitled to recover general damages without the need of proving special damages. If however, the statements were defamatory only by reference to "surrounding circumstances" then before the jury could "award any damage to plaintiff, plaintiff must first establish that he has sustained special damage as a legal result of the defamatory statement." (See BAJI No. 7.09.2 (7th ed. 1986) pp. 272-273.) In other words, plaintiff was entitled to recover both special and general damages if the defamatory statements were libelous on their face. Otherwise, plaintiff was entitled to recover general damages only if he first proved special damage.

We need not determine whether the statements here in question were libelous on their face or only by reference to surrounding circumstances because plaintiff presented evidence to show the special damage plaintiff suffered as a result of the defamatory publications. Special damages, as the trial court instructed the jury, "compensate plaintiff for losses, if any, suffered to date and which he is reasonably certain to suffer in the future in respect to his property, business, trade, profession, or occupation including the amount of money which plaintiff has expended as a result of the alleged libel which were legally caused by the libel which was published by the defendant." (See BAJI No. 7.11 (7th ed. 1986) p. 277.)

As defendants acknowledge, plaintiff presented evidence to show special damage of slightly more than $600,000 in lost construction business plaintiff suffered as the result of defendants' defamatory statements. Defendants challenge the sufficiency of that evidence and further assert plaintiff failed to demonstrate that such losses were proximately caused by defendants' defamatory statements. We disagree and here again note, with respect to both assertions, that defendants recount only the evidence favorable to the defense. Thus, defendants have demonstrated only that there was conflicting evidence on the question of special damage. That showing, as discussed above, is inadequate to overcome the presumption that the record contains evidence to sustain every essential finding of fact.

In addition to plaintiff's evidence regarding the loss of construction revenue, we are of the view that plaintiff's purported loss on the sale of his RNB stock is evidence of, and therefore compensable as, special damage. According to plaintiff's testimony, the RNB stock was the only asset plaintiff possessed which easily and readily could be converted to cash. Plaintiff felt compelled to sell that stock and pay off the outstanding RNB loan balances due to the publicity attending plaintiff's removal from the RNB board and in order to lessen the adverse impact that publicity would have on plaintiff's ability to obtain credit from other financial institutions.

To that end, plaintiff offered evidence to show that after defendants adopted the bylaw and removed plaintiff from the board of directors, plaintiff entered into an agreement with Hemet Bancorp (Hemet) to sell his shares of stock in RNB ln order to repay the principal balance on his outstanding RNB loans. Plaintiff apparently originally contacted Hemet in order to obtain a loan, secured by the RNB stock, in order to pay the outstanding RNB loans. Hemet declined the loan but

offered to purchase plaintiff's stock in RNB. Apparently because banking regulations precluded plaintiff from selling his entire block of RNB stock to Hemet without first obtaining regulatory approval, Hemet and plaintiff agreed to a transaction in which plaintiff immediately would sell 4.9 percent of his stocks for cash, the balance to be sold upon receipt of the necessary regulatory approval. Hemet, in turn, agreed, as a condition of the sale, to loan plaintiff the additional funds necessary to pay off plaintiff's RNB loans. Hemet, apparently recognizing plaintiff's "vulnerability" agreed to pay plaintiff only book value of $6.44 per share. At trial, plaintiff offered evidence to show that the value of the stock, presumably at the time of the sale to Hemet, was between $9.25 and $15 per share.

We conclude the foregoing constitutes substantial evidence to support the jury's implied finding that plaintiff suffered special damage as the result of defendants' defamatory statements. Having so concluded, the jury then was allowed to consider and award general or compensatory damages. In this regard, the trial court instructed the jury according to BAJI No. 7.10 that, "If you find that the defendant defamed plaintiff by a libel and that such libel was a legal cause of general damages to plaintiff, in determining the amount of such general damage, you should consider but are not limited to the following: [¶] 1. The extent of the publicity given by the defendant to the libel; [¶] 2. Plaintiff's good name, reputation, and the loss thereof; [¶] 3. Plaintiff's shame, mortification, insured feelings and mental suffering; [¶] 4. Plaintiff's prominence in the community where he lives; [¶] 5. Plaintiff's professional or business standing in the community where he does business. [¶] In determining the amount of plaintiff's damage, the law does not establish any absolute fixed or mathematical rule or standard by which to compute such damage; therefore, you may exercise your discretion but must do so without passion or prejudice for or against either

party. Furthermore, such damages shall not be enhanced by a repetition of such libel by third persons who are not parties to this action unless such repetition was authorized or intended or could have been reasonably foreseen."

Evaluating the general compensatory damage verdict according to the foregoing instruction, and the factors enumerated therein, we conclude the award of $2,254,787 is not excessive, assuming the damage verdict includes both special and general damages attributed to defendants. With respect to general damages, defendants' defamatory statements regarding plaintiff's purported loan defaults were published in the local newspaper on two separate occasions. Defendants acknowledge, albeit in the context of arguing plaintiff was a public figure as set out above, that the newspaper coverage of plaintiff's "ouster" from the RNB board of directors was extensive and generated a great deal of public interest. Moreover, and again by defendants' admission, the effect of that newspaper publicity, which defendants presumably intended by allowing the interviews with the press, apparently was s0 pervasive that children of plaintiff's subcontractors were taunted at school. That evidence in our view reveals the extent of the publicity generated by the newspaper articles alone, and without considering the proxy statement or Billings' letter to the shareholders, was far reaching in the community.

Plaintiff also presented testimony from several witnesses to show plaintiff generally was a well-respected member of the community and a successful local real estate developer and building contractor. One of plaintiff's friends testified that he came close to physical blows with a group of people who openly mocked plaintiff. In short, the evidence presented at trial and considered by the jury supports both the award and amount of compensatory damages in connection with the defamation action. Consequently, we reject defendants'

assertion that the compensatory damage award was excessive as a matter of law.

C. Mitigation of Damages Instruction

As a separate contention, but one related to the compensatory damage award, defendants contend the trial court gave inadequate instruction to the jury on plaintiff's duty to mitigate his damages, a contention we identified as issue number five, above. Specifically, defendants contend the trial court erred in giving only one instruction on the duty to mitigate damages rather than the three instructions requested by defendants. Here again, we disagree.

In this regard, the trial court instructed the jury, "Defendants are not required to compensate plaintiff for any expenses plaintiff could have avoided by a reasonable effort." Defendants do not contend that this instruction is an inaccurate or erroneous statement of the law. Instead, defendants argue, in effect, that their three requested instructions more fully explained to the jury the legal principle of mitigation.[26] In other words, defendants contend only that their proposed jury instructions were better than the instruction on mitigation of damages given by the trial court.

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[26] The three instructions defendants requested and the trial court refused are as follows:

"Where damage to person or property is threatened or inflicted by either breach of contract or tort, the injured party has the active duty to use reasonable care and diligence to prosect himself and minimize the loss. If plaintiff, by his own neglect, unnecessarily enhances the damages, he cannot recover the excess."

"Plaintiff cannot recover for alleged expenses incurred in connection with his construction business which he could have avoided by reasonable effort, or which resulted from his own neglect."

"Plaintiff is not entitled to recover damages for alleged losses arising from the sale of his Bank stock in excess of those losses he could have minimized by using reasonable care.

Our function is to determine whether error occurred and not to evaluate quality of performance. Because defendants do not challenge the accuracy of the mitigation instruction given by the trial court but only contend that their requested instructions better stated the pertinent legal principles we need not address defendants' argument in this regard. The trial court instructed the jury on plaintiff's duty to mitigate his damages, as defendants concede, therefore, no error occurred.

3. PUNITIVE DAMAGES AWARDS

We next address defendants' contentions pertinent to the punitive damage award, issue number six, above. In this regard, as set forth above, defendants contend that such award was improper, first, because defendant RNB, as a federally chartered bank, was an instrumentality of the federal government and as such was immune from liability for punitive damages. Next, defendants contend the award of punitive damages was improper because there was evidence that defendants, in adopting the bylaw which disqualified plaintiff from continuing to serve on the board of directors of RNB, relied on advice of counsel. Finally, defendants contend the punitive damage awards were excessive as a matter of law and as such constitute a taking of property without due process of law.

A. Immunity

Our discussion of defendants' immunity contention shall be brief. Once again, defendants' discussion of this assertion does not mention whether and if so at what point defendants raised this assertion in the trial court. Presumably, immunity from liability for punitive damages is an affirmative defense and logically would have been raised by defendants in some manner prior to trial, ideally by way of a motion to strike the punitive damage allegation contained in plaintiff's amended complaint. Our review of the record reveals defen-

dants did not challenge the punitive damage allegation in any manner prior to trial.[27] In other words, defendants permitted the issue of punitive damages to be presented to jury without apparent objection and therefore presumably waived the assertion.

Defendants, belatedly in our view, did assert the defense of immunity in their motion for new trial. Assuming RNB did not waive the assertion, as above noted, we nevertheless conclude the contention lacks merit. Defendants, or more correctly, RNB, cite extensive authority for the general proposition that the federal government and its instrumentalities are immune from liability for punitive damages. Defendants, however, do not provide any authority to support the specific proposition that federally chartered national banks such as RNB, merely by virtue of their federal charter, are instrumentalities of the federal government and, thus, are similarly immune from such liability. As plaintiff points out, numerous cases, albeit without expressly discussing the immunity issue, uphold punitive damage awards against national banks. (See, e.g., Sanchez-Corea v. Bank of America (1985) 38 Cal.3d 892, 909.)

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[27] In reviewing the record, se have not read each page of the 4,000 pages of the joint appendix in lieu of clerk's transcript and exhibits. We save, however, reviewed the 11 pages of index to the joint appendix to determine whether any motion made by defendants prior to trial included the immunity assertion. That index reveals that defendants did not file a written motion to strike the punitive damage allegation. Nor is the immunity contention asserted by defendants in their demurrer to plaintiff ss amended complaint or motion for summary adjudication of issues. In fact, defendants did not even raise immunity as one of the affirmative defenses in their answer to plaintiff's amended complaint. We decline to read the more than 3,300 pages of reporter's transcript to determine if defendants orally moved to strike or otherwise challenge the punitive damage allegation on the basis of purported immunity.

Accordingly, for either or both of the foregoing reasons, we conclude the immunity contention lacks merit.

B. **Advice of Counsel**

Defendants' second attack on the punitive damage award is equally unavailing, although for different reasons. Defendants here contend the punitive damage issue should not have been submitted to the jury in light of the evidence that defendants relied on the advice of counsel in enacting the bylaw which removed plaintiff from the board of directors. In other words, defendants contend advice of counsel if not a complete defense, at the very least, demonstrates defendants acted in good faith in adopting the bylaw, and thus negates malice.

Here, yet again, defendants do not mention whether this contention was raised in the trial court and if so in what context and manner. We shall not belabor that defect here because it is expedient to note, assuming the contention was raised below, it would have no application to the defamation theory of recovery. As the above-emphasized language indicates, this assertion, assuming it was raised below and further assuming it is an accurate statement of the law, would apply, if at all, to the first count for purported illegal ouster and punitive damages awarded in connection therewith. Defendants do not suggest that the statements to the press, as recounted in the newspaper, were made on the advice of counsel thereby establishing defendants' good faith and concomitantly negativing malice in connection with the defamation count.

Moreover, the jury, presumably at defendants' request, was instructed that "Plaintiff cannot recover punitive damages where defendant acted in good faith reliance on-the advice of counsel." The jury, as evidenced by the fact that it awarded punitive damages to plaintiff, obviously found the actions of RNB and Billings, in connection with adoption of the bylaw and in all other respects, were not the result of good faith reliance on the advice of counsel. We are bound by this

implied finding absent a showing by defendants that it is against the weight of the evidence. Defendants have not so shown. Consequently, for each of these reasons, we conclude defendants' contention regarding advice of counsel is meritless.

C. **Excessiveness**

As a final challenge to the punitive damage award defendants assert the award was excessive in light of defendants' conduct and net worth, and as such, constitutes an unconstitutional taking of defendants' property without due process of law. Again, defendants do not mention whether this assertion wag raised in the trial court. We have determined defendants have preserved this issue for review on appeal by raising it in both their motion for judgment notwithstanding the verdict and motion for new trial. Correctly stated, the issue raised by defendants is whether the trial court abused its discretion in denying either defendants' motion for judgment notwithstanding the verdict or motion for new trial with respect to the punitive damage award on the grounds set forth above. We conclude, as we shall explain, that the trial court did not abuse its discretion.

The pertinent facts, as mentioned above, are after the jury returned its general verdict finding liability under each theory of recovery pursued by plaintiff at trial, the jury then considered the issue of punitive damages. On this issue, the jury returned a verdict awarding plaintiff punitive damages of $2,300,000 against RNB and $130,000 against defendant Billings. The punitive damage awards apparently represent one year's income for RNB and one year's salary for Billings.[28]

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[28] We were unable to locate that portion of the record which supports this assertion. The financial statements of both RNB and Billings contained in the exhibit portion of the joint appendix, and cited by plaintiff to support the foregoing assertion, do not expressly identify

(continued...)

Defendants, in connection with a different issue and in an earlier portion of their brief, contend the punitive damage award must be reversed because it is impossible to determine whether that award was based upon the defamation cause of action. In support of this assertion, defendants rely on Lanouette v. Ciba-Geigy Corp. (1990) 230 Cal.App.3d 889. On December 3, 1990, after defendants filed their opening brief in this appeal, the California Supreme Court granted review of Lanouette. (See Lanouette v. Ciba-Geigy Corp. (1990) 222 Cal.App.3d 1094.) Consequently, Lanouette is no longer citable authority or "good law." Because defendants do not cite any other authority to support this contention, we shall not address it, other than to note, in our view, that portion of the Lanouette opinion relied on by defendants was decided wrongly.[29]

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[28](...continued)
the annual income of either defendant. However, because defendants neither discuss nor refute the portion of plaintiff's brief which includes this assertion, we assume the assertion is an accurate statement of the facts presented in the trial court and therefore is correct.

[29] The Lanouette court concluded, because the plaintiff in as wrongful termination of employment action was not entitled, as a matter of law, to recover tort damages for breach of the implied covenant of good faith and fair dealing, the punitive damage award, although correct under plaintiff's intentional infliction of emotional distress theory of recovery, had to be reversed because it could not be determined which theory of recovery the jury relied on in awarding punitive damages. According to the Lanouette court, and relying exclusively on Di Giorgio Corp. v. Valley Labor Citizen (1968) 260 Cal.App.2d 268, "Where a jury verdict is erroneous in one part and the award of damages is not reasonably subject to separation, the judgment on that issue must be reversed." (Lanouette v. Ciba-Geigy Corp., supra, 230 Cal.App.3d at p. 908.) Di Giorgio, in turn, holds that because the purpose of punitive damages is to punish a defendant for his or her own wrongful conduct, a punitive damage award in a lump sum, jointly and severally, against multiple defendants in a defamation action" is not reasonably subject to separation" and therefore must be reversed. (Di Giorgio Corp. v. Valley
(continued...)

Turning to defendants' assertion that the punitive damage award was excessive, therefore the trial court abused its discretion in denying defendants' motion for new trial, "It is a well-settled rule that after an exemplary damage award has been approved by the trial court with the denial of a motion for new trial, as in this case, the reviewing court will declare the amount excessive only if, upon a review of the entire record, the award must be said to be so grossly excessive as to indicate passion or prejudice on the part of the jury [citations]." (Roemer v. Retail Credit Co. (1975) 44 Cal.App.3d 926, 937.) Stated otherwise, "our review of punitive damage awards rendered at the trial level is guided by the 'historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice. . . . [Citation.]" (Neal v. Farmers Ins. Exchange (1978) 21 cal.3d 910, 927, quoting Bertero v. National General Corp. (1974) 13 Cal.3d 43, 65, fn. 12.)

According to Neal v. Farmers Ins. Exchange, the factors reviewing courts should consider to determine whether punitive damage awards are excessive are "[1] the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. . . . [2] the amount of compensatory damages awarded; in general even an act of considerable reprehensibility will not

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[29](...continued)
Labor Citizen, supra, 260 Cal.App.2d at p. 276-277.) In our view, the holding in Di Giorgio does not support the conclusion arrived at by the court in Lanouette and clearly has no pertinence in this appeal where, as set out above, the jury separately awarded punitive damages against RNB and Billings.

be seen to justify a proportionally high amount of punitive damages if the actual harm suffered is small [3] Also to be considered is the wealth of the defendant; obviously, the function of deterrence . . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. . . . By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (Neal v. Farmers Ins. Exchange, supra, 21 Cal.3d at p. 928.)

Viewing the instant case according to the foregoing factors, we cannot conclude, as a matter of law, that the punitive damage awards here in question were excessive. In this regard we note the trial court instructed the jury according to the foregoing factors and we must presume, absent evidence to the contrary, the jury followed that instruction and considered the reprehensibility of defendants' conduct as well as defendants' financial condition in calculating the amount of the respective punitive damage awards.

Defendants argue their conduct was not reprehensible and assert, as apparently they have from the inception of this litigation, that in adopting the bylaw and informing shareholders of plaintiff's purported loan defaults, "the defendant directors were fulfilling their duties s fiduciaries of the bank." The jury, and later the trial court in ruling on defendants' motion for new trial, apparently determined otherwise. More significantly, in this connection defendants do not discuss the reprehensible nature of the various defamatory statements regarding both the fact and amount of plaintiff's purported loan defaults as set forth in the newspaper article and proxy statement. We interpret defendants' silence on this point either as a significant omission or an implicit admission that such

conduct was sufficiently reprehensible to support the punitive damage verdict.[30]

Likewise, defendants do not discuss the wealth factor. Here, again, we view defendants' silence as an implicit admission that the amounts of the respective punitive damage awards against RNB and Billings, which as above noted, equate to one year of income for each defendant, do not run afoul of this factor. We similarly reject defendants' statement, unaccompanied by any discussion, that the amounts of the respective punitive damage awards are disproportionate to the compensatory damage award. As plaintiff points out, the combined total of both punitive damage awards is $2,430,000, which is nearly equal to the compensatory damage award of $2,254,787. We cannot say as a matter of law that a ratio of one to one is disproportionate. In fact, common sense and logic suggest quite the opposite conclusion.

In summary, we conclude the punitive damage awards comport with each factor enunciated in Neal and as such cannot be said to be excessive as a matter of law.

As a final challenge to the punitive damage awards defendants assert the awards in this case violate the due process clause and therefore are unconstitutional. In support of this assertion, defendants rely on Browning-Ferris Industries v. Kelco Disposal, Inc. (1989) 492 U.S. 257, 109 S.Ct. 2909, 2921, where the United States Supreme Court declined to address a due process challenge to a punitive damage award

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[30] For this same reason, we reject defendants' suggestion that the punitive damage awards are not supported by substantial evidence. While defendants discuss the pertinent legal principle, they fail to discuss any facts, or lack thereof. We again take defendants' failure as an implicit admission that the evidence discussed above in connection with our discussion of the defamation cause of action is sufficient to support the punitive damage award.

after first noting that, "The parties agree that due process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was reached in proceedings lacking the basic elements of fundamental fairness."

Relying on the foregoing language, and similar language in other cases, defendants contend the trial below "was a blatant denial of procedural safeguards to the defendants . . . . The [trial] court's rulings which permitted the admission of evidence which was highly prejudicial to the defendants, but excluded evidence which would have enabled the defendants to overcome the prejudice caused by such erroneously admitted evidence, and the innumerable erroneous jury instructions given, all bear ample testimony to this fact. The award of punitive damages violated the defendants' right to due process of law . . . ."

The problem we have in addressing this contention is one repeated throughout defendants' brief -- the total absence of any reference to, least of all discussion of, the purportedly erroneous evidentiary rulings and jury instructions. Presumably, defendants' assertions relate to purported erroneous evidentiary rulings and jury instructions identified by defendants in earlier portions of their brief, specifically, in the sections entitled "The Numerous Erroneous Evidentiary Rulings Hade by the Trial Court" and "The Jury Instructions." In these sections, defendants identify the evidentiary rulings and jury instructions about which defendants complain but defendants do not discuss how or why such rulings and jury instructions were erroneous. In other words, defendants have failed to demonstrate error occurred.

Moreover, we have never been persuaded by the argument that the trial court admitted evidence "highly prejudicial" to one of the parties. Presumably, all evidence presented by one side of a lawsuit is probative and in that

sense prejudicial to the other side. The relevant inquiry is whether such evidence was otherwise inadmissible or whether the probative value of the evidence substantially is outweighed by the prejudicial effect. (See Evid. Code, § 352.) In short, defendants have not raised the pertinent and legally cognizable arguments on appeal.

4. DENIAL OF A FAIR TRIAL

We reject defendants' assertion, raised as a separate contention in this appeal and identified as sisue number seven, above, that "the demeanor and conduct of the trial judge, together with his partiality to plaintiff's case, deprived defendants of the right to a fair trial." Here, again, defendants identify the various ways in which defendants contend the trial court revealed purported bias in favor of plaintiff but, in doing so, defendants do not demonstrate error occurred. For example, defendants assert "the trial court's prejudicial predisposition became apparent on the very first day of trial when it ruled on the parties [sic] motions in limine. The trial court granted plaintiff's motion in limine to exclude the most probative and exculpatory evidence on Mr. Billings [sic] absence of malice against the plaintiff. However, the court denied defendants' motion in limine and allowed the plaintiff to testify on the same malice issue, and as to events which occurred over 20 years prior to the time of trial." Ignoring defendants' failure to identify the purportedly "probative and exculpatory evidence" in question, apparently inviting this court to extract that information either from defendants' 119-page brief or the 7,000-page record, defendants have not shown that any error occurred.

In short, defendants' claim of purported bias consists of a laundry list of instances during trial in which the trial court ruled or acted in favor of plaintiff and against defendants. Thus, among other things, defendants point to the fact that the trial court (1) permitted plaintiff's counsel to engage

in "strong" opening argument without interruption from the bench but interrupted defendants' counsel at the start of defense opening argument and in a side bar conference directed there be no further argument; (2) interrupted defense counsel during cross-examination of plaintiff regarding the sale of plaintiff's RNB Stock to Hemet BanCorp and terminated that cross-examination pursuant to Evidence Code section 352, later relenting and allowing defendants only 30 minutes additional time to complete questioning on this "major aspect of damages"; and (3) the trial court admitted into evidence nine of ten trial exhibits challenged by defendants and later, after plaintiff's counsel complained, relented and admitted the tenth exhibit.

Defendants cite additional instances in which the trial court ruled against defendants apparently to support their view that the only plausible explanation for the trial court's numerous rulings in favor of plaintiff and against defendants is that such rulings were erroneous. We will not recount each of the remaining instances cited by defendants because we reject defendants' implication and suggest another plausible and probable explanation for the trial court's action is that defendants' assertions, below, may not have been supported by the law. In short, we need not determine whether the trial court properly ruled in each instance cited by defendants because defendants have not made the threshold showing that any of the rulings in question were erroneous. Accordingly, we reject the assertion that defendants were denied a fair trial and that the trial court, as evidenced by nothing more than the number of rulings in favor of plaintiff, was biased against defendants from the outset of the trial.

5. ATTORNEYS' FEES AWARD

The final contention we must address in this appeal is defendants' assertion that the trial court erred in granting plaintiff's motion for attorneys' fees pursuant to Code of Civil

Procedure section 1021.1. That section, as defendants acknowledge, applies only to certain counties, including Riverside, and permits the trial court to award reasonable attorneys' fees, "in an amount to be determined in the court's discretion," to the prevailing party in a civil suit "if all of the following conditions are met:

"(1) The party has made an offer for judgment under section 998.

"(2) That offer was not accepted within the time provided in Section 998.

"(3) The party to whom the offer was made failed to obtain a more favorable judgment. . . . " (Code Civ. Proc., S 1021.1, subds. (a) & (b).)

In pursuing this contention on appeal, defendants do not challenge the foregoing preconditions, thereby conceding plaintiff made the required statutory offer which defendants rejected and after which defendants did not obtain a more favorable judgment.[31] Instead, defendants argue only that they acted reasonably in rejecting plaintiff's Section 998 offer, therefore, the trial court erred in awarding attorneys' fees to plaintiff.

On the issue of reasonableness, Code of Civil Procedure section 1021.1 provides in pertinent part that, "In exercising its discretion to award attorney's fees the court shall consider the following factors:

"(1) The reasonableness or lack thereof, of a party's failure to accept an offer for judgment under Section 998 in light of the facts known to the party at the time, of [sic] which, in light of all of the circumstances, should have been

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[31] Two weeks prior to trial, plaintiff made a Code of Civil Procedure section 998 offer of $980,000.

known to the party. Reasonableness shall be determined by a consideration of at least the following matters:

"(A) The then apparent merit or lack of merit in the claim that was the subject of the action.

"(B) The closeness of the questions of fact and law at issue.

"(C) Whether the offeror has unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer.

"(D) Whether the action was in the nature of a `test case,' presenting questions of far-reaching importance affecting nonparties.

"(E) The relief that might reasonably have been expected if the claimant should prevail.

" (F) The amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

"(G) Those other matters that the court may deem relevant in the interest of justice." (Code Civ. Proc., S 1021.1, subd. (c).)

In addressing this issue, defendants preface their discussion with the statement that, "Applying each of those factors to the instant case, it is evident that the award of attorney's fees to the plaintiff was totally unwarranted." Defendants' discussion, charitably characterized, focuses on only four of the seven factors set out above, and, therefore, belies that prefatory statement. Specifically, defendants argue the reasonableness of rejecting plaintiff's section 998 offer, first, because "defendants reasonably believed that their conduct which gave rise to this suit [enactment of the bylaw which removed plaintiff from the RNB board of directors] was governed by federal law" and thus presumably was lawful. In

this regard, defendants assert they adopted the bylaw after consultation with legal counsel and out of legitimate concern over plaintiff's chronic loan defaults which jeopardized "the overall welfare of an otherwise exemplary bank." Next, defendants argue that, "The enormous amount of damages awarded to plaintiff is due in large measure to his success on his fourth cause of action for [tortious] breach of the [implied] covenant of good faith and fair dealing" which defendants contend they reasonably believed did not pertain to them in light of Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654. Thirdly, defendants argue that plaintiff, despite timely discovery requests, did not provide defendants with documentation to "substantiate" plaintiff "loss of construction business," therefore plaintiff failed to provide information necessary for defendants to evaluate the reasonableness of plaintiff's offer. Finally, defendants assert "the dearth of cases dealing with the liability of banks in this context makes it a 'test case,' whose determination will have far reaching importance for nonparties."[32]

We reject each of defendants' assertions. In addressing this contention, we note, at the outset, that an award of attorneys' fees under Code of Civil Procedure section 1021.1 is directed to the discretion of the trial court and, as with all such discretionary matters, will not be reversed on appeal absent a clear showing of prejudicial abuse. (See Mission

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[32] Defendants also note under Code Or Civil Procedure section 1021.1, it is only attorneys' fees incurred from the date of plaintiff's offer to settle a month before trial which can be awarded. Although defendants, by making this assertion, imply the trial court awarded plaintiff attorneys' fees for a period greater than that authorized by statute, defendants do not demonstrate that such occurred. Moreover, even if such error occurred, it would not negate an otherwise proper attorneys' fee award but only would require reduction of that award.

Imports, Inc. v. Superior Court (1982) 31 Cal.3d 921, 932.) Defendants have not made such a showing.

On this issue defendants again fall victim to their persistent refusal to recognize that plaintiff pursued his action below under various theories of recovery, including defamation, any one of which, if valid, supports the general verdict. Consequently, while defendants reasonably may have believed their action in adopting the bylaw was lawful and otherwise legitimate, that belief does not automatically justify the conduct underlying the defamation theory. Because defendants do not attempt to demonstrate that each of plaintiff's various theories of recovery lacked merit (Code Civ. Proc., § 1021.1, subd. (c)(l)(A)) or that each such theory involved close questions of fact and law (Code Civ. Proc., § 1021.1, subd. (C)(l)(B)) defendants have failed, at least with respect to those factors, to demonstrate the trial court clearly abused its discretion in granting plaintiff's attorneys' fees motion. Moreover, defendants cannot make the required showing because we have already determined that the defamation count is a valid theory and does not involve close questions of fact and law.

Defendants' discussion of the two remaining factors purportedly relied on by defendants to support their reasonableness assertion is equally devoid of detail and as such reveals such arguments are meritless. Defendants do not expressly discuss the "documentation" or "information" plaintiff purportedly failed to produce to substantiate plaintiff's damage claim for loss of business and which defendants claim was necessary to evaluate the reasonableness of plaintiff's offer under Code of Civil Procedure section 1021.1, subdivision (c)(l)(C). Our review of the portions of the reporter's transcript cited by defendants to support this argument reveals defendants attempted to obtain documentation, including non-discoverable, privileged information such as tax returns,

regarding plaintiff's claimed loss of business by serving plaintiff with a subpoena duces tecum on the day of trial . In response to plaintiff's motion to quash that subpoena, defendants attempted to explain and presumably justify the undisputed lateness of their discovery request by pointing out that plaintiff did not provide sufficient information in responses to pertinent interrogatories propounded by defendants. According to the discussion in the record, other than the last minute subpoena duces tecum, defendants did not otherwise request document production from plaintiff during the course of pretrial discovery. In short, the portion of the record relied on by defendants does not establish plaintiff unreasonably refused to furnish information regarding his claimed business losses but instead reveals that defendants did not request such documentation in a timely manner.[33]

Finally, defendants attempt to characterize this litigation as a "test case" due to the "dearth of cases dealing with liability of banks in this contexts is equally devoid of discussion and merit. Because defendants rely on this assertion without undertaking any discussion we just assume defendants' "test case" argument pertains to defendants' assertion, previously discussed, that federally chartered banks are instrumentalities of the federal government and therefore are immune

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[33] Defendants also cite a "best evidence" objection raised by defendants during plaintiff's trial testimony regarding the value of plaintiff's construction business during the period from May 1, 1986, through April 30, 1987, to support the claims that plaintiff unreasonably withheld information necessary to evaluate plaintiff's claimed business losses. The trial court correctly overruled that objection apparently recognizing plaintiff was qualified to express an opinion regarding the value of his business and best evidence simply was not pertinent. Documents substantiating plaintiff's opinion are not foundational, as defendants apparently contend, but merely go to the weight of plaintiff's opinion. Moreover, defendants' objection does not support the inference defendants would have us draw.

from liability for punitive damages. We rejected that argument when earlier raised by defendants and do so again here.

Defendants, in our view, simply have failed to demonstrate that the trial court clearly abused its discretion in granting plaintiff's motion for attorneys' fees under Code of Civil Procedure section 1021.1. Accordingly, we conclude defendants' contention in that regard wholly is meritless.

REQUESTS FOR JUDICIAL NOTICE

During the pendency of this appeal, defendants and plaintiff requested this court to take judicial notice of various documents. We reserved ruling on each request for judicial notice for decision with the appeal and here address those requests.

Defendants fired the first shot in the judicial notice volley on December 11, 1990, by asking this court to take judicial notice, first, of the Government Accounting Office report to Congress, dated September 1990 entitled "Bank Insurance Fund -- Additional Reserves and Reforms Needed to Strengthen the Fund" and, second, of a purported "legislative analysis of Corporations Code section 303, subdivision (c)." According to defendants, judicial notice of the fact and content of both documents is permitted under Evidence Code section 452, subdivisions (c) and (h), pertaining, respectively, to official acts of the legislative, executive and judicial branches of state and federal governments and facts and propositions not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of indisputable accuracy.

Plaintiff returned fire on January 18, 1991, relying on the same subdivisions of Evidence Code section 452 cited by defendants in their request for judicial notice, by requesting this court take judicial notice of the 1989 Annual Report of Riverside National Bank.

Defendants fired the last shot on January 22, 1992, by requesting this court take judicial notice of various liens filed in Riverside County Superior Court against any judgment plaintiff might receive in the lawsuit which is the subject of this appeal. In connection with this final request for judicial notice, defendants relied on Evidence Code section 452, subdivision (d)(1) (pertaining to records of any court of this state) and subdivision (h), discussed above.

We deny each of the requests for judicial notice filed by defendants and plaintiff. In doing so, we resist the temptation to discuss in detail the frivolous nature of each request. We content ourselves with pointing out, assuming the relevance of the requests, that each request pertained to matters not presented in the trial court. In other words, each request asked this court to consider evidence purportedly pertinent to factual determinations resolved during trial. Our province does not include fact finding but instead is limited to reviewing legal issues pertaining to purported error which occurred in the lower court.

Moreover, even assuming our province extended to relitigating factual determinations resolved in the trial court, the Evidence Code sections relied on by both sides permit us to take judicial notice only of the documents in question but not their contents. In other words, we could, for example, judicially notice the fact that the GAO issued a report to Congress in September 1990 regarding the Bank Insurance Fund but we cannot take judicial notice of the content of that report. Similarly, we could take judicial notice of the fact that RNB issued an Annual Report in 1989 and the fact that various liens were filed in the trial court. Presumably, neither defendants nor plaintiff are aided by our limited ability to take judicial notice only of the existence of the documents in question but instead depend, incorrectly, on our ability to take judicial notice of the content of each such document. Accord-

ingly, and in any case, each request for judicial notice is denied.

CONCLUSION

In undertaking our review of the numerous and extensive issues raised by defendants in this appeal, we initially were struck by defendants' apparent inability to appreciate that a jury might view the various allegations of plaintiff's complaint and the evidence pertinent thereto in a manner adverse to defendants. In the trial court, defendants adhered steadfastly to the position that defendants' actions, in all respects, were proper. The jury, as evidenced by its verdict, obviously reached a different conclusion, as did the trial court, as evidenced by its denial of defendants' post-trial motions. Although defendants' trial court stance arguably could be characterized as advocacy, we do not fully comprehend defendants' adherence to that stance in this appeal. In other words, despite, what in our view, was an unequivocal message from the jury, defendants on appeal not only persist in their trial court assertions, but now also blame the trial court for their apparent lack of success.

On appeal, defendants compound the tactical error we believe they committed in the trial court by not only effectively requesting this court to relitigate the entire dispute, but also, as the foregoing discussion reveals, perhaps ad nauseam, by failing to demonstrate error cognizable on appeal occurred in the trial court. The one possible error arguably most detrimental to defendants is one about which defendants did not complain, specifically, the form of the general verdict with special interrogatories. Defendants, as previously noted, acquiesced both to the form and use of the general verdict with special interrogatories and therefore may not now complain on appeal. As we have discussed, the general verdicts on liability and damages eliminated the need for us to address many of defendants' attacks on plaintiff's theories of

recovery. That, combined with defendants' failure to demonstrate other cognizable error, requires us to affirm the judgment.

DISPOSITION

The judgment is affirmed in its entirety. Plaintiff to recover his costs on appeal.

NOT FOR PUBLICATION.

McKinster
J.

We concur:

/s/ Ramirez
P.J.

/s/ McDaniel
J.*

*Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

RECEIVED
JUN 16 1992

APPENDIX D

Fourth Appellate District, Division Two, No. E006746

SO27895

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

NICHOLAS E. TAVAGLIONE, Respondent

v.

MICHAEL C. BILLINGS, Et Al., Appellants

SUPREME COURT
FILED
MAR - 3 1994
Robert Wandruff Clerk
R. CRUZ
DEPUTY

Appellants' petition for review DENIED.

LUCAS

Chief Justice

APPENDIX E

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

Division Two

FILED
DEC 10 1993
COURT OF APPEAL FOURTH DISTRICT

TAVAGLIONE, NICHOLAS E.
PLAINTIFF-RESPONDENT

v.

BILLINGS, MICHAEL C., ET AL.
DEFENDANT-APPELLANT

ORDER

E006746
Riverside County No. 187341

THE COURT:

The petition for rehearing is DENIED.

McKINSTER

Acting Presiding Justice

cc: Riverside County Superior Court Clerk
All Counsel

COPY

APPENDIX F

FILED
RIVERSIDE COUNTY
MAR 10 1989
WILLIAM E. GONSALVES, Clerk
by J. Pearson, Deputy

MILLER, BOYKO and BELL
A Professional Corporation
550 West "B" Street, Suite 400
SAN DIEGO, CALIFORNIA 92101-3599
(619) 235-4040

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

NICHOLAS E. TAVAGLIONE, Plaintiff, vs. MICHAEL C. BILLINGS; DOLORES MAGNUSON; MARYANN ARCHAMBAULT; LEON SIGERMAN; J. RICHARD SWARTZ; ROY E. WHITEHEAD; RIVERSIDE NATIONAL BANK; and DOES 1 through 100, inclusive, Defendants.	CASE NO. 187341 JUDGMENT UPON GENERAL VERDICT WITH SPECIAL INTERROGATORIES AND SPECIAL VERDICT TRIAL DATE: January 17, 1989

This cause came on regularly for trial by jury on January 17, 1989, in Department A of the Superior Court of California for the County of Riverside, Indio Branch, the Honorable John P. Carroll, Judge, presiding. Plaintiff appeared by his attorneys Roy Morrow Bell, Esq., and Fletcher W. Paddison, Esq., of the law firm of Miller, Boyko and Bell, and defendants appeared by their attorneys Timothy M. Thornton, Esq., and Jeff E. Scott, Esq., of the law firm of Manatt, Phelps, Rothenberg and Phillips.

A jury of twelve (12) persons was regularly impaneled and sworn to try the action. Witnesses on the part of both plaintiff and defendants were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the Court, the jury retired to consider their verdict and the special interrogatories submitted to them, and subsequently returned a verdict which is set forth below. Thereafter, the jury retired to consider the special verdict for the award of punitive damages which is set forth below.

WHEREFORE, by virtue of the law and by reason of the general verdict with special interrogatories and the special verdict, it is hereby ordered, adjudged and decreed that plaintiff, Nicholas E. Tavaglione, shall recover damages against defendants as follows:

1. From defendant Riverside National Bank the sum of Two Million Two Hundred Fifty-Four Thousand Seven Hundred and Eighty-Seven Dollars ($2,254,787.00) in compensatory damages and Two Million Three Hundred Thousand Dollars ($2,300,000.00) in punitive damages, for a total judgment of Four Million Five Hundred Fifty-Four Thousand Seven Hundred and Eighty-Seven Dollars ($4,554,787.00) against Riverside National Bank.

2. From defendant Michael C. Billings the sum of Two Million Two Hundred Fifty-Four Thousand Seven Hundred and Eighty-Seven Dollars ($2,254,787.00) in compensatory damages and One Hundred Thirty Thousand Dollars ($130,000.00) in punitive damages, for a total judgment of Two Million Three Hundred Eighty-Four Thousand Seven Hundred and Eighty-Seven Dollars ($2,384,787.00) against Michael C. Billings.

3. From defendant J. Richard Swartz the sum of One Dollar ($1.00).

4. From defendant Maryann Archambault the sum of one Dollar ($1.00).

5. From defendant Roy E. Whitehead the sum of One Dollar ($1.00).

WITNESS the Honorable John P. Carroll, Judge of the Superior Court of the State of California for the County of Riverside, Indio Branch, and my hand and seal of this Court this day of March, 1989.

J. Porres

CLERK OF THE SUPERIOR COURT

MAR 10 1989

Entered on date filed
INDIO
Judgement Book 42 Page 248

JUDGMENT UPON GENERAL VERDICT
AND SPECIAL VERDICT

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE		FOR COURT USE ONLY
TITLE OF CASE (abbreviated) NICHOLAS E. TAVAGLIONE v. MICHAEL C. BILLINGS, ET AL.		
ATTORNEY(S) NAME AND ADDRESS MILLER, BOYKO AND BELL 550 West "B" street, Suite 400 San Diego, CA 92101-3599	TELEPHONE (619) 235-4040	
ATTORNEY(S) FOR: Plaintiff	HEARING DATE-TIME-DEPT	CASE NUMBER 187341

DECLARATION OF SERVICE BY MAIL

I, DEBORAH L. TRELOAR declare: That I am, and was at the time of the service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am employed (Residing/Employed) in the County of San Diego, California, within which county the subject mailing occurred.

My San Diego address is 550 West "B" Street, Suite 400, San Diego, CA 92101-3559. I served the following document(s) JUDGEMENT UPON GENERAL VERDICT WITH SPECIAL INTERROGATORIES AND SPECIAL VERDICT by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

TIMOTHY M. THORTON, ESQ. VIA FEDERAL EXPRESS
JEFF E. SCOTT, ESQ.
MANATT, PHELPS, ROTHENBERG & PHILLIPS
11355 West Olympic Boulevard
Los Angeles, CA 90064

I then sealed each envelope and, with the postage thereon fully prepaid, deposited each in the United States mail at San Diego California, on March 8 19 89.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 8 19 89.

Deborah L. Treloar
(Signature)

PROOF OF SERVICE BY MAIL

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE INDIO BRANCH		FOR COURT USE ONLY
TITLE OF CASE (abbreviated) NICHOLAS E. TAVAGLIONE v. MICHAEL C. BILLINGS, ET AL.		
ATTORNEY(S) NAME AND ADDRESS MILLER, BOYKO AND BELL 550 West "B" street, Suite 400 San Diego, CA 92101-3599	TELEHPONE (619) 235-4040	
ATTORNEY(S) FOR: Plaintiff	HEARING DATE-TIME-DEPT	CASE NUMBER 187341 (transferred from Riverside)

DECLARATION OF SERVICE BY MAIL

I, DEBORAH L. TRELOAR declare: That I am, and was at the time of the service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am employed (Residing/Employed) in the County of San Diego, California, within which county the subject mailing occurred.

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TIMOTHY M. THORTON, ESQ.
MANATT, PHELPS, ROTHENBERG & PHILLIPS
11355 West Olympic Boulevard
Los Angeles, CA 90064

I then sealed each envelope and, with the postage thereon fully prepaid, deposited each in the United States mail at San Diego California, on March 13 19 89.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 13, 19 89.

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(Signature)

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State of California

ss.

County of Los Angeles

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One First Street, N.E.
Washington, D.C. 20543
(*By Express Mail: Original and 40 Copies*)

Clerk, California Court of Appeal
Fourth Appellate District
Division Two
303 West Fifth Street
San Bernardino, California 92401

Clerk of the Superior Court
for the County of Riverside
Honorable John P. Carroll, Judge
County Courthouse
4050 Main Street
Riverside, California 92501

Clerk of the Superior Court
for the County of Riverside
Indio Branch
Honorable H. Morgan Dougherty, Judge
Department C
46-209 Oasis Street
Indio, California 92201

Mr. Roy Morrow Bell
Mr. Fletcher W. Paddison
Miller, Boyko and Bell
550 West "B" Street, Suite 400
San Diego, California 92101-3599
Attorneys for Plaintiff,
Mr. Nicholas E. Tavaglione

Superior Court Clerk
Riverside County
Post Office Box 431 -- Appeals
Riverside, California 92502

Mr. Raymond Pepper
Miller, Boyko and Bell
550 West "B" Street, Suite 400
San Diego, California 92101-3599

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 15, 1994, Los Angeles, California.

Betty J. Malloy
(Original Signed)

Supreme Court, U.S.
FILED

No. 93 1640 APR 18 1994

OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term, 1994

NICHOLAS E. TAVAGLIONE,

Respondent,

v.

MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT, J. RICHARD SWARTZ, ROY E. WHITEHEAD, and RIVERSIDE NATIONAL BANK,

Petitioners.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME 3 OF 3

HAIGHT, BROWN & BONESTEEL,
Roy G. Weatherup,* and
Rita Gunasekaran
1620 26th Street, Suite 4000 North
Post Office Box 680
Santa Monica, California 90406-0608
Telephone: (310) 449-6000

Attorneys for Petitioners,
MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT, J. RICHARD SWARTZ, ROY E. WHITEHEAD, and RIVERSIDE NATIONAL BANK

*** Counsel of Record**

Westside Law Publishers • West Hollywood, CA 90069 • (310) 273-2887

95 PP

TABLE OF APPENDICES

Page

Appendix A

Opinion of the California Court of Appeal, Filed November 17, 1993 . . . . . A-1

Appendix B

Opinion of the California Supreme Court Reversing and Remanding the Case to the Court of Appeal B-1

Appendix C

Opinion of the California Court of Appeal, Filed June 15, 1992 . . . . . C-1

Appendix D

Order of the California Supreme Court Denying Review, Filed March 3, 1994 . . . . . D-1

Appendix E

Order of the Court of Appeal Denying Rehearing, Filed December 10, 1993 . . . . . E-1

Appendix F

Judgment of the Trial Court F-1

Appendix G

Petition for Rehearing of Defendants, Filed December 2, 1993 . . . . . G-1

Appendix H

First Amended Complaint F-1

Appendix I

Demurrer to First Amended Complaint I-1

Appendix J

Notice of Ruling Denying Demurrer J-1

Appendix K

Answer to Complaint K-1

Appendix L

Fourtheenth Amendment to the Constitution of the United States L-1

Appendix M

12 U.S.C. section 375b M-1

Appendix N

12 U.S.C. section 1818(a)(2) N-1

Appendix O

12 C.F.R. section 215.4(a)(1) O-1

APPENDIX G

In the Court of Appeal of the State of California

FOURTH APPELLATE DISTRICT
DIVISION TWO

NICHOLAS E. TAVAGLIONE,

Plaintiff and Respondent,

v.

MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT, J. RICHARD SWARTZ, ROY E. WHITEHEAD, and RIVERSIDE NATIONAL BANK,

Defendants and Appellants.

PETITION FOR REHEARING

To the Honorable Justices of the Court of Appeal, Fourth Appellate District, Division Two:

Defendants and appellants, in accordance with rule 27, and in compliance with the requirements of rule 29(b)(2), of the *Rules of Court*, respectfully petition for rehearing of this

case. It is submitted that the matter should be reheard for the following reasons:

I.

By Deciding the Case on the Basis of a Supposed Oral or Implied Contract to Make a Loan, the Court of Appeal Has Violated Government Code Section 68081 and the Defendants' Constitutional Right to Notice.

In its opinion, the Court of Appeal has apparently recognized that the plaintiffs entire case depends upon the supposed duty of Riverside National Bank to make loans to the plaintiff. There is no such legal duty. The court has, however, attempted to supply one. It has ruled that the evidence was "sufficient to establish either an oral agreement or an agreement implied from Billing's conduct that defendants, at the very least, would not refuse unreasonably to renew or extend plaintiff's outstanding loans while plaintiff's cash flow problem persisted and so long as plaintiff was current on the interest payments." (Opinion, page 48.)

The record, however, contains no cause of action for any type of breach of contract, whether a supposed oral agreement or an implied contract. There is no allegation in the operative first amended complaint about the existence of any such contract. Moreover, any contract to make a loan on the part of a bank would violate federal law, which prohibits loans to borrowers who are not credit worthy. 12 *U.S.C.* 1818. The law does not permit an illegal contract to be implied. There is no evidence of an express contract, which would, in any event, violate the parole evidence rule and perhaps also banking regulations.

The issue of breach of contract has not been briefed by any party to this case. Therefore, this court has the legal

obligation to grant rehearing. *Government Code* section 68081 provides as follows:

> "Before the Supreme Court, a court of appeal, or the appellate department of a superior court renders a decision in a proceeding other than summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party."

In *Adoption of Alexander S.*, 44 Cal.3d 857 (1988), the California Supreme Court recognized that the statute mandates compliance with its requirements, and that the reviewing courts have no discretion to act otherwise. The Supreme Court soundly chastised the Court of Appeal in that case for failing to heed the statutory command. 44 Cal.3d at 864-865.

Even if there is evidence that could support a breach of contract theory, which defendants deny, the present Court of Appeal opinion is improper. Rehearing is required, so that the issue may be briefed. Moreover, if the defendants are subject to liability for breach of contract, they had a constitutional right to notice of the claim.

A classic statement of the constitutional right to notice can be found in *Lambert v. People of the State of California,* 355 U.S. 225 (1957). In *Lambert,* the Supreme Court declared that:

> "Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to

> defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed." 355 U.S. at 228.

The requirement of notice applies to both civil and criminal cases. 355 U.S. at 228.

To be constitutionally sufficient, adequate notice must be given of legal proceedings, which must be reasonably calculated to inform parties of those proceedings which may directly and adversely affect their legally protected interests. *Walker v. City of Hutchinson,* 352 U.S. 112, 115-116 (1956). See also, *Covey v. Town of Somers,* 351 U.S. 141 (1956).

In *Mullane v. Central Hanover Bank & Trust Company,* 339 U.S. 306 (1950), the Court overturned a state court decree settling accounts by the trustee of a common trust fund, on the ground that the notice given under state law was insufficient to satisfy the requirements of the Fourteenth Amendment. The Court observed that "[m]any controversies have raged about cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." 339 U.S. at 313. The notice in the *Mullane* case was insufficiently specific, because the beneficiaries of the trustee answer for negligent or illegal impairment of their interests. Furthermore, the beneficiaries were not notified about the fact that fees might be allowed that would diminish payments to them. 339 U.S. at 313.

In the operative first amended complaint, there is no allegation whatsoever of a contract to make a loan to the plaintiff. Prior to this court's decision of November 17, 1993, the theory of breach of contract had not even entered the litigation. If the defendants are liable for breach of a contract, they should have been given notice of this claim.

The civil equivalent of a criminal indictment is a complaint. Although the Supreme Court "has endorsed the modern relaxation of pleading rules, it has never receded from the requirement that civil complaints provide party's defendant with 'fair notice' of the claims against them." *New Motor Vehicle Board of the State of California v. Orrin W. Fox Company,* 439 U.S. 96, 125 (1978) (dissenting opinion of Justice John Paul Stevens, citing the unanimous opinion of the Court in *Conley v. Gibson,* 355 U.S. 41 (1957)).

Certainly, the defendants had the constitutional right to defend themselves against any claim of breach of contract. They could have presented evidence to show the invalidity of the theory. They were never given the opportunity to do so.

The Court of Appeal, perhaps reluctantly, has recognized the invalidity of the plaintiff's primary cause of action for "illegal ouster." In its place, the court has substituted a "breach of contract" theory, something that it has no legal authority to do. Rehearing must be granted, in order to comply with *Government Code* section 68081, and to avoid trampling on the defendants' constitutional rights.

II.

Because the Plaintiff's Basic Cause of Action for "Wrongful Ouster" Is Invalid, the Secondary Causes of Action, Such as Defamation and Breach of the Covenant of Good Faith and Fair Dealing, Are Also Invalid, Since They Cannot Stand Independently.

In its original opinion, the Court of Appeal misinterpreted and misapplied the general verdict rule. It does so again. The general verdict rule presupposes "separate and independent counts or causes of action" that are "independent in nature and isolated in content so as to preclude any interrelationship between them." *Henderson v. Harnischfeger*

Corporation, 12 Cal.3d 663, 674 (1974). Even this threshold requirement is not met in the present case.

The court has recognized (Opinion, page 18) that the main legal theory on which this case was tried, "illegal ouster," is invalid as a matter of law. However, the court fails to grasp the interrelationship between this invalid cause of action and the two causes of action which the court finds sufficient.

For a plaintiff to have the right to sue a defendant, "there must be a wrongful invasion by the defendant of some legal right of the plaintiff and damage resulting to the plaintiff from the wrongdoing." *Priola v. Paulino,* 72 Cal.App.3d 380, 387 (1977). Thus, the plaintiff must plead the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts constituting the defendant's wrongful conduct. *Lodi v. Lodi,* 173 Cal.App.3d 628, 631 (1985). The relationship between facts pleaded and legal theories relied upon presents recurrent conceptual problems. *Perry v. Robertson,* 201 Cal.App.3d 333, 339 (1988). The same course of conduct may represent both a breach of contract and a tort, while negligent performance of a contractual duty may give rise to a claim of breach of contract. 201 Cal.App.3d at 340. Where a hybrid cause of action arises, the plaintiff may pursue two or more legal theories of recover, unless they are inconsistent, requiring an election of remedies. 201 Cal.App.3d at 340. Nonetheless, under the "primary right" theory of pleading followed in California, a plaintiff's cause of action is based upon the injury suffered by the plaintiff, regardless of the particular legal theory or theories upon which the plaintiff seeks redress. *Friedberg v. Cox,* 197 Cal.App.3d 381, 388 (1987). It is the right sought to be established, not the remedy or relief, which governs the nature and substance of the cause of action. *R &*

A Vending Services, Inc. v. City of Los Angeles, 172 Cal.App.3d 1188, 1194 (1985).

As pleaded, the cause of action for breach of the implied covenant of good faith and fair dealing is based upon the plaintiff's former relationship with the Riverside National Bank, as a stockholder, a director, and a borrower. These three relationships are alleged to create a duty on the part of the bank and its officers and directors to permit the plaintiff to continue in office as a director. However, by recognizing the invalidity of the "illegal ouster" claim, the Court of Appeal has undermined all of the subsidiary claims. If there is nothing legally wrongful in ousting a deadbeat director, then no covenant of good faith and fair dealing arises with respect to the status of the plaintiff as a director. Similarly, the defamation claim rests upon the contention that the plaintiff was not, in fact, validly removed from the board of directors of the Riverside National Bank, contrary to what was reported in the press.

The Court of Appeal has failed to recognize that all of the causes of action pleaded flow from the plaintiff removal as a director of the Riverside National Bank. If the removal was not legally wrongful or actionable, then the remaining causes of action are invalid. Moreover, even if the secondary claims were independent in some sense, they were certainly tainted by the lengthy trial on "illegal ouster."

III.

Having Found Fundamental Instructional Error With Respect to the "Wrongful Ouster" Claim, the Court of Appeal Had the Duty to Review the Entire Record to Determine the Effect of Such Error, But Has Failed to Do So.

In recognizing the legal invalidity of the "illegal ouster" cause of action, the Court of Appeal has implicitly found that the jury instructions on this cause of action should not have been given. However, the court fails to do what is required when instructional error is found, which is to determine the effect of the error after an examination of the entire record. Had the entire record in this case been examined, rather than just the first amended complaint, the court would have concluded that the instructional error with respect to the "illegal ouster" cause of action severely prejudiced the defendants. After all, nearly all of the trial was devoted to the cause of action which has been found not to have ever existed.

Rather than undertake the analysis required when instructional error has been identified, the Court of Appeal persists in misinterpreting and misapplying the general verdict rule, which is inapplicable where there is instructional error. The classic formulation of this rule can be found in this court's decision in *Henderson v. Harnischfeger Corporation,* 12 Cal.3d 663 (1974). The rule is that "a general verdict implies a finding in favor of the prevailing party of every fact essential to the support of his action or defense." 12 Cal.3d at 673. A corollary of this rule is that, where there are several different counts or causes of action, a general verdict will stand if the evidence supports it on anyone sufficient count. 12 Cal.3d at 673.

Although the general verdict rule still stands, it has been largely swallowed up by exceptions, one of which was

found applicable in the *Henderson* case itself. In particular, after citing the general verdict rule and its corollary, this court in *Henderson* stated that "the giving of an improper instruction presents a different situation" from one where the general verdict rule would otherwise be applicable. 12 Cal.3d at 673. Where instruction error is involved, the question is whether, in the absence of such error, the jury might have rendered a verdict in favor of the losing party. 12 Cal.3d at 674.

In explaining the inapplicability of the general verdict rule, and its corollary, to instructional error, this court in *Henderson* reasoned as follows:

> "We are not dealing with separate and independent counts or causes of action and the sufficiency of evidence on any one of them. Nor are we dealing even with separate issues, so independent in nature and isolated in content as to preclude any interrelationship between them. As we have shown, the two issues of strict liability on the one hand and assumption of risk on the other are inherently conjoined by the facts of the accident. . . . The formula which defendant's argument suggests is not applicable and certainly will not permit us to shortcut our constitutional duty to examine the entire record so as to determine the effect of the challenged instruction." 12 Cal.3d at 674.

As noted above, the validity of the claims which are discussed by the Court of Appeal is dependent upon the validity of the "illegal ouster" cause of action. Certainly, the jury was improperly told that it could rely on the "illegal ouster" theory, on which all of the plaintiff's claims were based.

In *McGee v. Cessna Aircraft Company*, 82 Cal.App.3d 1005 (1978), the party that had prevailed at trial argued that "the judgment below should not be reversed if there is substantial evidence to support the verdict even though the case was submitted to the jury on a wrong theory of law." 82 Cal.App.3d at 1019. The *McGee* court, unlike the Court of Appeal in the present case, rejected the argument, finding that "this rule has no application where the jury has been erroneously instructed," and that a "[j]udgment obtained based on a wrong application of the law cannot stand." 82 Cal.App.3d at 1019.

Even if the secondary causes of action asserted by the plaintiff were in some sense independent of the invalid "illegal ouster" claim, this court was required to examine the whole record in order to evaluate the effect of the erroneous instructions given on a nonexistent cause of action.

In *LeMons v. Regents of University of California*, 21 Cal.3d 869 (1978), this court recognized that "there is no precise formula for measuring the effect of an erroneous instruction" given to a jury. 21 Cal.3d 876. However, several factors were set forth to be considered in measuring the degree of prejudice, including the degree of conflict in the evidence on critical issues, the arguments to the jury of the prevailing party's attorney, whether the jury requested a rereading of an erroneous instruction or of related evidence, the closeness of the jury's verdict, and the possible effect of other instructions. 21 Cal.3d at 876. Applying these factors, it is clear that the manifest errors of the trial court in this case were prejudicial.

Almost the entire trial concerned the "illegal ouster" theory. There was a great deal of conflict in the evidence concerning the creditworthiness of the plaintiff, and the reasonableness of the refusal of the defendant Riverside National Bank to make new loans. The erroneous "illegal

ouster" instructions were serious errors affecting all causes of action.

A recent decision of the Supreme Court illustrating the procedure that should be employed by an appellate court upon finding instruction error is *Weiner v. Fleishman*, 54 Cal.3d 476 (1981). After finding an instructional error, whereby the plaintiff was assigned a burden of proof that was higher than the law requires, the Supreme Court proceeded to determine whether the erroneous instruction required reversal of the judgment. It was noted that instructional error, according to the California Constitution, may be the basis of reversal of a judgment only after "an examination of the entire cause" has led to the conclusion that the error has resulted in a "miscarriage of justice." 54 Cal.3d at 490. After studying the "entire cause," the court found the jury instruction that was challenged by the plaintiff to be prejudicial. 54 Cal.3d at 490-491.

"Prejudicial error is established where *the record as a whole* reveals a reasonable probability that a result more favorable to the appealing party would have been reached in the absence of the error." (Emphasis added.) *Rimmele v. Northridge Hospital Foundation*, 46 Cal.3d 123, 131 (1975). Thus, it appears necessary for an appellate court, determining prejudicial error, to review "the record as a whole."

Had the Court of Appeal fulfilled its duty to review the entire record, not just the first amended complaint, it would have undoubtedly concluded that the "illegal ouster" instructions were prejudicially erroneous, requiring a new trial on all issues, assuming that some cause of action survives. The invalid "illegal ouster" theory pervaded the entire six week trial, leading both the trial judge and the jury into error.

IV.

The Twenty Two Issues Set Forth in the Appellants' Opening Brief Were All Properly Presented, but the Court of Appeal Has Misstated or Failed to Consider All of Them.

In addition to failing to follow the correct analysis, after finding instructional error, the Court of Appeal has failed to deal appropriately with other issues raised by the defendants in their opening brief. Twenty two separate issues of law were presented, and all of them were in proper form, requiring resolution by the Court of Appeal. The court had no right to reformulate the issues or simply ignore them.

An issue of law is one that "can be resolved by examining relevant cases and statutes and applying the rules of law extracted from those sources to an established set of facts." CEB *California Civil Appellate Practice,* section 4.4, page 65 (2d ed. 1985); *Board of Education v. Jack M.,* 19 Cal.3d 691, 698, fn. 3 (1977); *Morrison v. State Board of Education,* 1 Cal.3d 214, 238 (1969). An issue of law is not necessarily limited to a particular ruling by a trial judge, but can involve a variety of other issues such as the sufficiency of the pleadings, the sufficiency of the evidence, the interpretation of a writing or a statute, and the choice of law to be applied, to name but a few.

An issue of fact, on the other hand, can be resolved only by considering conflicting evidence. *Board of Education v. Jack M.,* 19 Cal.3d 691, 698, *fn.* 3 (1977). It has been explained that "[a]n issue that requires the trial court to evaluate the evidence by weighing the strength of one party's proof against that of the other, or by considering the credibility of witnesses or other evidence, presents a question of fact." CEB *California Civil Appellate Practice,* section 4.5, page 65 (2d ed. 1985).

The appropriate standard of review on appeal is dependent upon whether the issue to be determined is a question of law or a question of fact. Consequently, learned authors have emphasized the critical importance of the distinction between the two. Eisenberg, Horvitz & Wiener, *California Practice Guide: Civil Appeals & Writs* section 8:2 (1992).

While the distinction between questions of fact and law is easily drawn in some cases, it is more subtle and blurred in others. This is especially so with regard to mixed questions which the California Supreme Court described as:

> "[T]hose 'in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant legal] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.' " *People v. Louis*, 42 Cal.3d 969, 984 (1986).

In *Louis*, our Supreme Court analyzed in detail the rationale behind the different standards of review to be applied to questions of fact and law, the three distinct steps to be followed in deciding a mixed fact-law question, and concluded that the "*proper standard for mixed questions appears to be independent review.*" 42 Cal.3d at 984, 985-987. The court explained that "[t]his is so because usually the application of law to fact will require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles." 42 Cal.3d at 987.

It is evident from an analysis of the twenty two issues raised in the appellants' opening brief in this case that each of those is either a pure issue of law or a mixed question in which legal determinations predominate. Issue one deals with federal preemption; issue two with the trial court's lack of

jurisdiction and instructional error; issues four, six, eight, ten, eleven, thirteen, seventeen, eighteen, nineteen, and twenty with sufficiency of the pleadings and of the evidence, and issues three, five, seven, nine, twelve and fourteen with instructional error. Issue fifteen relates to the erroneous admission of evidence, sixteen to the erroneous exclusion of evidence, twenty one to the award of attorneys' fees, and twenty two to judicial impartiality.

Unfortunately, the Court of Appeal asserts that some or all of the instructional errors urged by the defendants were not properly preserved at the trial court level. In making this assertion, the court is simply wrong.

Due to an express statutory provision, litigants are not required to object to legally incorrect jury instructions, in order to preserve the error. *Code of Civil Procedure* section 647 provides in relevant part that the "giving [of] an instruction, refusing to give an instruction, or modifying an instruction requested" are all matters which are "deemed excepted to." Consequently, when an instruction erroneously states the law, a party's failure to object or propose a correct instruction will not bar it from raising the error on appeal. *Lua v. Southern Pacific Transportation Company,* 6 Cal.App.4th 1897, 1904 (1992); *Mock v. Michigan Millers Mutual Insurance Company,* 4 Cal.App.4th 306, 333 (1992).

In the instant case, it is unnecessary to resort to such statutory presumptions, since the trial court acknowledged on the record that the defendants had preserved their objections to the jury instructions given. Although the trial judge spent two and one half days settling the jury instructions with counsel, he would not allow most of the proceedings to be on the record, despite the defendants' protests. [R.T. 15, 2972, 3041:26-3042:2.] Consequently, defendants' trial counsel memorialized the unusual understanding arrived at with the judge about preservation of any instructional error for appel-

late review. The trial judge agreed on the record that the defendants were deemed to have objected to all instructions to be given. The following exchange between the defendants' co-trial counsel, Mr. Jeff Scott and the court is found in the trial transcript:

> "MR. SCOTT: We've had two-and-one-half days discussing jury instructions, some in chambers, some in open court. Approximately one-half day was held on the record, Monday afternoon, February 27th. We discussed certain objections on the record. Many of my other -- defendants' other objections to jury instructions were not made on the record. *The court denied a request to have it on the record on the grounds that the Court stated that all objections would be preserved for appeal. That was the Court's understanding, in any event.* I just want that reflected on the record, that we wished to have it on the record, we were denied that request, we're reserving all our rights to object to jury instructions, and I will file with the Court a memorandum re the same objections to jury instructions, which would make our record, to some extent, in this matter. Thank you, your Honor.
>
> "THE COURT: Okay. All right. This memorandum is ordered filed. Okay. Let's go." (Emphasis added.) [R.T. 15, 3043:21-3044:9, J.A. 6, 1610.]

The proper procedure, that should have been followed in this case, was to examine each of the twenty two issues presented by the defendants separately. If errors were found, then the court should have examined the entire record, to determine whether the errors were prejudicial. By failing to

follow the proper procedure, the Court of Appeal has effectively denied the defendants of their right to appeal. It has also failed to address the material facts of the case, since most of the record, apart from the first amended complaint, was not even examined by the court.

V.

The Court of Appeal, Having by Its Own Admission Failed to Review the Whole Record, Has Seriously Misstated Many Material Facts and Has Omitted to Mention Many Others.

Commencing with the faulty premise that the "facts underlying this appeal essentially are not in dispute" [Opinion, page 5], the decision filed by this court is riddled with factual errors and omissions. Contrary to the court's conclusion, there are numerous factual issues in dispute. For instance, a material factual dispute that permeated the trial was whether it would have been a prudent banking practice to renew the loans totalling $750,000.00 to the plaintiff, the largest shareholder in the bank, while he was a director of the bank and his financial condition was deteriorating materially. Another highly disputed issue was whether Mr. Billings and the other directors had acted in good faith and without malice when they adopted the bylaw that led to the plaintiff's removal as a director.

Based simply on the fact that the board of directors called a special meeting which the plaintiff chose not to attend, this court makes the unsubstantiated assumption that the plaintiff "allegedly was not given notice of the special meeting at which the bylaw was amended." (Opinion, page 6.)

The Court of Appeal acknowledges that its statement of facts is taken solely from the plaintiff's first amended complaint. (Opinion, page 5, fn. 3.) However, it ignores or overlooks material factual discrepancies in its recitation of

facts. For instance, at pages 6, 9, and 10 of its Opinion, the court repeats, and thereby adopts, the plaintiff's admissions in his pleadings that he was in default on his loans from the bank when the bylaw was enacted in February 1987. However, at page 14 of its Opinion, the court appears to change its view of the facts and states that, when the bylaw was enacted, "plaintiff was 30 days in default on only one loan and that default occurred because defendant Billings refused to extend or renew that loan."

It is pertinent to point out that the court's statement that, "[o]nce RNB credited that $4,000 payment, plaintiff was not in default and, in fact, was current on all interest payments up through January 18, 1987," is in error. (Opinion, page 14.) The record shows that, as of February 1987, the plaintiff was past due for one quarterly interest payment on his $271,405.14 loan from January 30, 1987; three monthly interest payments and three and a half months in principal on his $350,000.00 loan; three interest payments on his $63,000.00 loan; and his entire $30,000.00 loan, which was due to be paid off in full on January 26, 1987. [J.A. 11, 3055; R.T. 11, 2307-2318.]

The court faults the defendants for failing to cite adequately to the record. (Opinio, pages 22-23.] The appellants' opening brief originally filed by the defendants contained 346 citations to the record in the 33 pages contained in the initial statement of facts. Consequently, every fact alleged, as well as every pleading, evidentiary, and instructional error asserted by the defendants, in their opening brief, was well substantiated. The amended brief filed by the defendants, in accordance with this court's instructions, contained 544 citations to the record in the fact and argument sections of the brief combined. The defendants complied with this court's order by merely referring back to the citations to the record contained in the statement of facts, and repeating those citations in the argument section of the opening brief. Despite

a thorough research of the issue, this opinion appears to be the first to require record citations in the argument section of an opening brief despite proper citations to the record in the statement of facts section of the same brief.

In its discussion of the defamation cause of action, the Court of Appeal inexplicably chooses December 31, 1986, to test the truth or falsity of the defendants' statements regarding the plaintiff, although the court does not dispute that all the allegedly defamatory publications were made in March or April of 1987. (Opinion, page 40.) As seen previously, the plaintiff was past due on several of his loans both in interest and principal. [J.A. 11, 3055; R.T. 11, 2307-2318.] The truth of a publication must, of course, be tested on the date of the publication, and not on some other arbitrary date which conveniently fastens liability on innocent defendants.

The Court of Appeal makes the incredible accusation that the defendants have not cited to the record in support of their contention that "no evidence was presented at trial to establish the contractual relationship between plaintiff and defendants." (Opinion, page 45.) Absence of evidence is impossible to establish by citation to the record. This is perhaps best exemplified by the court's effort to do so. The court announces that the plaintiff's "allegation regarding the `loan transactions' although cursory and conclusionary [sic] nevertheless adequately alleges the requisite underlying contract between plaintiff and defendants." (Opinion, page 46.)

If this court's pronouncement is correct, every borrower would have such a contract with a bank, based on prior loan transactions, regardless of the borrower's present credit worthiness. If the defendant bank were to follow such a policy it would risk involuntary loss of its deposit insurance. See, for example, 12 *U.S.C.* 1818. Merely because Mr. Billings had previously extended the due dates for the plaintiff's payment of the principal owed on the loans in question, so long as he

was current on the interest payments, simply cannot be sufficient to establish either an oral agreement or an implied agreement to renew the loans indefinitely, regardless of the plaintiff's financial condition. (Opinion, pages 47-48.)

This court repeatedly refuses to consider issues on the alleged ground that the defendants have not included a reference to the record on appeal. One such instance is found at page 51, *fn.* 22. Contrary to this court's assertion, the defendants did cite to the record in complaining of such instructional error. The exact sentence reads: "Moreover, any decision not to renew plaintiff's loans would have to be based upon 'objective criteria and criteria upon which a reasonable loan officer, in the exercise of his discretion, would have adopted.' [J.A. 6, p. 1677.]" (Appellants' opening brief at page 35.)

At page 75 of its Opinion, this court again accuses the defendants of failing "to identify the purportedly `probative and exculpatory evidence' in question." However, at page 31 of the appellants' opening brief it is stated:

> "The trial court granted the plaintiff's motions *in limine* to exclude all evidence pertaining to the plaintiff's filing for bankruptcy at an earlier date and regarding his trip to Hawaii with a ladyfriend when he was separated from his wife, even though evidence of plaintiff's financial success and good character was permitted. [R.T. 2, pp. 59-64.] As a result, the court would not permit defendants to establish absence of malice by showing that Mr. Billings had requested the draft bylaw to be changed so that a prior filing of bankruptcy, by a director or candidate for the position, would not result in disqualification from the

board of Riverside National Bank. [R.T. 4, pp. 529-532.]"

Mr. Billings knew that the plaintiff had filed for bankruptcy previously. Therefore, if Mr. Billings really had an *animus* to remove the plaintiff from the board, rather than to induce him to pay off his loans, Mr. Billings should have accepted the draft bylaw proposed by the Bank's attorneys. The plaintiff could not cure a disqualification based upon his prior bankruptcy. However, Mr. Billings did not accept the attorneys' proposal. Instead, Mr. Billings wanted a revised bylaw which would permit the plaintiff to cure his default. Exclusion of such exculpatory evidence is clearly prejudicial to all defendants, both on liability and damages, especially punitive damages. The above cited are but a few of the numerous material omissions and misstatements of fact contained in the recent decision filed by this court.

VI.

Conclusion.

Based on the foregoing argument and authorities, it is requested that this petition for rehearing be granted so that justice may prevail.

Respectfully submitted,

HAIGHT, BROWN & BONESTEEL,
Roy G. Weatherup, and
Rita Gunasekaran

Attorneys for Defendants and Appellants,
MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT,
J. RICHARD SWARTZ, ROY E. WHITEHEAD,
and RIVERSIDE NATIONAL BANK

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on December 2, 1993, I served the within *Petition For Rehearing* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, California Court of Appeal
Fourth Appellate District
Division Two
303 West Fifth Street
San Bernardino, California 92401
(*By Express Mail: Original and Four Copies*)

Clerk, California Supreme Court
Ronald Reagan Building
300 South Spring Street,
2nd Floor
Los Angeles, California 90013
(*Five Copies*)

Clerk of the Superior Court
for the County of Riverside
The Honorable John P.
Carroll, Judge
County Courthouse
4050 Main Street
Riverside, California 92501

Mr. Roy Morrow Bell
Mr. Fletcher W. Paddison
Mr. Thomas T. Lord
Miller, Boyko & Bell
550 West "B" Street, Suite 400
San Diego, California
92101-3599

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 2, 1993, Los Angeles, California.

Betty J. Malloy
(Original Signed)

APPENDIX H

FILED
RIVERSIDE COUNTY
JUL 23 1987
WILLIAM E. CONERLY, Clerk
By

MILLER, BOYKO and BELL
A Professional Corporation
550 West "B" Street, Suite 400
SAN DIEGO, CALIFORNIA 92101-3599
(619) 235-4040

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

NICHOLAS E. TAVAGLIONE, Plaintiff, vs. MICHAEL C. BILLINGS; DOLORES MAGNUSON; MARYANN ARCHAMBAULT; LEON SIGERMAN; J. RICHARD SWARTZ; ROY E. WHITEHEAD; RIVERSIDE NATIONAL BANK; and DOES 1 through 100, inclusive, Defendants.	CASE NO. 187341 FIRST AMENDED COMPLAINT FOR ILLEGAL OUSTER OF PLAINTIFF AS A DIRECTOR; INVASION OF PRIVACY; BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING; DEFAMATION; AND INTERFERENCE WITH CONTRACTUAL RELATIONSHIPS

COMES NOW the plaintiff, Nicholas E. Tavaglione, who for causes of action against defendants, and each of them, alleges as follows:

FIRST CAUSE OF ACTION

[Illegal Ouster of Plaintiff as a Director]

1. Plaintiff Nicholas E. Tavaglione ["Tavaglione"] at all times material hereto has been a resident of Riverside County, California.

2. Defendant Riverside National Bank is a national banking corporation organized and existing pursuant to the laws of the United States. Riverside National Bank [the "Bank"] has its principal place of business in Riverside County, California.

3. Defendant Timothy C. Billings ["Billings"] is the President and a director of Riverside National Bank. Defendants Dolores Magnuson, Maryann Archambault, Leon Sigerman, J. Richard Swartz, and Roy E. Whitehead are directors of Riverside National Bank. Defendants, and each of them, personally committed, authorized or ratified the actions set forth herein.

4. Plaintiff is at present unaware of the true names, identities or capacities, whether individual, corporate, associate or otherwise, of those defendants sued herein as Does 1 through 100, inclusive, and therefore sues said defendants by such fictitious names. Plaintiff will ask leave to amend this complaint so as to set forth the same when the same has been ascertained. Plaintiff is informed and believes and thereon alleges that those defendants sued herein by such fictitious names, and each of them, are in some way responsible for the acts and events complained of herein, and proximately caused the injury and damages to plaintiff complained of herein. Plaintiff will ask leave to amend this complaint so as to more

specifically set forth the same when the same has been ascertained.

5. Plaintiff is informed and believes and thereon alleges that defendants, and each of them, were the agents, employees, and servants of each other, and that at all times relevant hereto, said defendants were acting within the course, scope and purpose of such agency, service and employment.

6. Plaintiff Tavaglione has been a shareholder of the Bank since approximately 1965. Plaintiff has served as director of the Bank since approximately 1974.

7. In April, 1986, plaintiff was the holder of 245,542 shares, constituting 13.4 percent of the outstanding and issued shares of the Bank. At this time, plaintiff holds approximately 8.5 percent of the outstanding and issued shares of the Bank. At all times material hereto, plaintiff has been, and is, the largest shareholder in the Bank.

8. In or about April, 1986, the Bank held its annual shareholder's meeting as required by its bylaws, as well as state and federal law. At the shareholders meeting, plaintiff, and the individual defendants, were each elected to serve as a member of the board of directors of Riverside National Bank. Pursuant to the Bank's bylaws, and as provided for by law, plaintiff was to serve as a director until the next annual shareholders meeting in April, 1987.

9. On or about February 3, 1987, plaintiff was advised by the Bank President, defendant Billings, that a new bylaw would be proposed to the board of directors which would regulate the appointment and qualification of directors. The bylaw, as proposed, is attached hereto as Exhibit "A" and incorporated by reference. The bylaw provided that any individual who had been in default more than 30 days under a loan to <u>any</u> financial institution would be disqualified from acting as a director of the Bank for a period of one year.

Further, the bylaw provided that such an individual would be disqualified even if the default was cured and was not a material default. The bylaw as proposed was to be applied retroactively.

10. Plaintiff is informed and believes and thereupon alleges that the bylaw was drafted upon instruction of the President of the Bank, defendant Billings, with the intent and purpose of:

(a) Ousting plaintiff as a director of the Bank;

(b) Depriving plaintiff of his right as shareholder to elect directors to the boards;

(c) Publicizing plaintiff's loan defaults; and

(d) Forcing plaintiff to sell his shares of the Bank.

11. As of February 3, 1987, plaintiff had loans from the Bank which had been in default for more than 30 days. Prior to February, 1987, there were no bylaws or board resolutions which regulated the loans or loan defaults of a Bank director, and no bylaw which disqualified a director because of any such defaults had ever been proposed.

12. Prior to February 26, 1987, plaintiff was not afforded the opportunity to cure the loan defaults and thereby avoid the effect of the bylaw. The bylaw as applied by defendants was retroactive, automatically disqualifying plaintiff as a director and as applied would have disqualified plaintiff even if his defaults had been cured by February 26, 1987.

13. The meetings of the board of directors take place on the third Wednesday of each month in accordance with the bylaws of the Bank. Plaintiff attended the regular monthly meeting of the board of directors on February 18, 1987. The bylaw was not passed or voted upon at that meeting.

14. The bylaws provide for the calling of special meetings of the board of directors. Pursuant to the bylaws, written notice of the meeting is required except when notice of the meeting is given "in person."

15. On February 26, 1987, a purported special meeting of the board of directors was held. Plaintiff was not given notice of the meeting in accordance with the bylaws. This meeting was improperly noticed and was an illegal meeting of the board of directors.

16. At the "meeting" on February 26, 1987, the board purportedly adopted the bylaw, in its final form, a true and correct copy of which is attached hereto as Exhibit "B" and incorporated herein by reference.

17. Pursuant to the purported "bylaw" the board of directors announced that plaintiff has been summarily removed from the board. Attached hereto as Exhibit "C" and incorporated by reference is a true and correct copy of such notice from Delores Magneson, Chairman of the Board.

18. The Bank is a federally-charted banking institution. As such, it is subject to the provisions of the National Bank Act as set forth in 12 U.S.C. §1, et seq. Except where the federal statute has stated a different rule, however, the Bank is subject to state law and the rules governing the organization and management of the Bank as a corporation.

19. Pursuant to California Corporations Code §303, "a director may not be removed prior to the expiration of such director's term of office" except as provided in the Code. Pursuant to California Corporations Law, a director may only be removed if he has been declared of unsound mind or has been convicted of a felony [§302], the director has been removed by vote of the shareholders as set forth in §303(a)(1), or the director has been removed, for cause, by the Superior Court pursuant to Corporations Code §304. Plaintiff was not,

and could not have been, removed pursuant to these provisions.

20. Pursuant to the California Corporations Code, plaintiff could not be removed as a director of the corporation. Plaintiff was duly elected at a shareholders meeting in April, 1986, and was entitled to serve out the remaining term of his office. In violation of Corporations Code §303, plaintiff has been improperly and illegally ousted as a director of the corporation.

21. Further, the bylaw, as adopted, provided that director was disqualified only if the director was in default for 30 days after February 18, 1987. The board of directors, however, intended the bylaw to disqualify plaintiff and applied the bylaw retroactively, and as an ex post facto provision, which automatically disqualified plaintiff. The bylaw provision was not applied fairly as to all directors and plaintiff was not treated the same as other directors who were similarly situated.

22. As a result of the illegal ouster of plaintiff as a director of the corporation, plaintiff has been denied access to the board of director meetings and the other rights and privileges as a director of a corporation. More significantly, plaintiff, as a shareholder of the corporation, has been denied representation on the Bank's board.

23. Pursuant to the bylaws, the Bank's annual shareholders meeting had been set by the board for April 15, 1987. Without cause, defendants wrongfully continued the shareholders meeting and failed and refused to hold a meeting on April 15, 1987, in violation of the Bank's bylaws and state and federal law. No date for the shareholders meeting has been set. As a result of defendants' actions, plaintiff has been denied representation on the board of directors.

24. As a direct and proximate cause of the illegal action of defendants, and each of them, plaintiff has been

illegally ousted as a director of the corporation and denied his rights as a shareholder. Plaintiff has sustained damages in an amount to be proven at trial.

SECOND CAUSE OF ACTION

[Defamation]

25. Plaintiff hereby repeats and realleges the allegations contained in Paragraphs 1 through 24, inclusive, and incorporates the same as though set forth in full.

26. In or about March, 1987, defendants, and each of them, published, or caused to be published, statements that plaintiff had been ousted as a member of the board of directors because of significant and substantial loan defaults with the Bank.

27. In or about March and April, 1987, defendants published or caused to be published statements concerning the outstanding loans of plaintiff to the Bank and the fact that such loans had been in default for more than 30 days. In addition to the statements stated above, and other statements, defendants published, or caused to be published, the statement that:

> Tavaglione, who is a Riverside National director for 13 years, was ousted from the Bank's board in late February after board members voted to remove any director who fell behind on loan payments to the Bank. At the time, Tavaglione had delinquent loans at the Bank totalling $714,705.00 according to Bank documents. [Emphasis added.]

28. The publications would be understood to state that:

(a) Plaintiff had defaulted upon substantial loans to the Bank;

(b) Plaintiff's defaults were material and could not be cured by plaintiff;

(c) Plaintiff's defaults affected the financial condition of the Bank;

(d) Plaintiff's financial condition was unstable; and

(e) Plaintiff's position as a director of the Bank placed plaintiff in a conflict of interest such that plaintiff would not act in the best interests of the Bank.

29. Defendants, and each of them, intended that the publications be understood in the manner alleged above. Defendants further intended that these statements be understood to state that plaintiff was a bad credit risk and defendants thereby intended to harm and injure plaintiff in his ability to obtain an extension of credit from other financial institutions.

30. Plaintiff is a real estate developer in Southern California and in the operation of his business he is dependent upon extensions of credit from financial institutions for the purposes of completing various construction projects. The publications were intended to harm and injure plaintiff in his activities as a developer and to force plaintiff into selling his shareholdings in the Bank. Defendants, and each of them, intended the statements to cause other financial institutions to refuse plaintiff further extensions of credit until all existing loan defaults were cured. At the time of the statements, defendants, and each of them, knew that the publication of the statements could cause other financial institutions to call their loans and to refuse further extensions of credit to plaintiff until any existing defaults were cured.

31. As a direct and proximate result of defendants' statements, plaintiff's financial condition and his reputation in

the community were materially damaged. As a result, plaintiff was required to cure all existing loan defaults and to pay off several loans with the Bank, which required plaintiff to sell his shareholdings in the Bank at less than their fair market value. In order to effect the sale of his shares, plaintiff entered into an agreement to sell his shares to the Bank of Hemet.

32. In or about April of 1987, plaintiff entered into an agreement with the Bank of Hemet on the sale of his shares in the Bank in order to cure existing defaults and pay off certain loans to the Bank. In April, 1987, defendant Billings wrote to the shareholders of the Bank stating that plaintiff's agreement with the Bank of Hemet was "illegal" and was not in the best interests of the Bank. These statements are false and accused plaintiff of illegal conduct that was inimical to the interests of the Bank.

33. As a result of defendants' publications, plaintiff has been held up to embarrassment, contempt and ridicule and has been materially injured in connection with his trade, business and occupation. Plaintiff's reputation and standing in the community has been damaged in that plaintiff is now believed to be financially unstable and to have engaged in illegal acts. Further, plaintiff's credit and reputation with institutional lenders has been damaged and plaintiff has been denied extensions of credit by such institutions as a direct and proximate result of defendants' publications.

34. As a direct and proximate result of defendants' actions, plaintiff has been forced to sell his stock in Riverside National Bank at book value, which is an amount far less than the actual fair market value of the stock.

35. As a result of defendants' actions, plaintiff has incurred damages in the amount of $1,500,000.00.

36. Defendants actions were oppressive and malicious and with the intent to injure plaintiff in his reputation and in

conscious disregard of plaintiff's rights and interests, whereby plaintiff is entitled to an award of punitive damages in the amount of $3,000,000.00.

THIRD CAUSE OF ACTION

[Wrongful Disclosure of Confidential Information]

37. Plaintiff hereby repeats and realleges the allegations contained in Paragraphs 1 through 36, inclusive, and incorporates the same as though set forth in full.

38. At all times material hereto, plaintiff had been depositor and a loan customer of the Bank. Prior to February, 1987, plaintiff, or his companies, had been issued loans by the Bank, in accordance with its customary business practices. The loans to plaintiff were tendered upon same or similar terms as were made available to other individuals in the community.

39. Plaintiff reposed trust and confidence in the Bank to maintain his financial privacy and the confidentiality of his loan transactions and records.

40. As of February, 1987, plaintiff, or his companies, had been in default under the terms and provisions of the various loans with the Bank. In February, 1987, defendants conspired amongst each other and agreed upon a plan to utilize plaintiff's loan defaults as a pretense for ousting plaintiff from the board of directors and thereafter publicizing plaintiff's ouster and his loan defaults in order to damage plaintiff's credit standing and thereby force plaintiff to sell his shareholders in the Bank.

41. Defendants, and each of them, had a duty to maintain the confidentiality and privacy of plaintiff's loan accounts with the Bank.

42. In furtherance of this plan and conspiracy, defendants, as alleged above, adopted a bylaw which purportedly

removed plaintiff from the board of directors in violation of California Corporations Code 303(c).

43. Thereafter, and in March, 1987, defendants published or caused to be published statements in the Riverside Press Enterprise as follows:

> Riverside National Bank removed Nicholas E. Tavaglione from its Board of Directors because the Riverside contractor fell behind on loan payments to the Bank, according to Bank document [sic].
>
> * * *
>
> J. Richard Swartz, Riverside National Bank's Executive Vice President, yesterday maintained that only Tavaglione's loan delinquencies triggered his ouster.
>
> Swartz who is a Board member said the Board decided to change the Bank's bylaws in February to prevent a Director who fell behind in loans from staying on the Board. Although the change resulted from Tavaglione's loans, it was not aimed at him alone, he said.

In March and April, 1987, defendants published, or caused to be published, statements that plaintiff's loans or defaults were substantial and necessitated plaintiff's ouster from the Bank.

44. In March, 1987, defendants caused a proxy statement to be delivered to the shareholders of the Bank. At the time of the preparation of the proxy statement, plaintiff was not a director of the Bank and had not been nominated to act as director of the Bank. Notwithstanding this, the proxy statement published the fact that plaintiff was a guarantor of substantial loan and that such loans were in default.

45. These publications stated and implied, or were intended to state and imply, that:

(a) Plaintiff had defaulted upon substantial loans to the Bank;

(b) Plaintiff's loan defaults were material and could not be cured;

(c) Plaintiff represented a poor credit risk whose defaults jeopardized the interests of the Bank;

(d) Plaintiff's financial condition was unstable; and

(e) Plaintiff had a conflict of interest which prevented him from fairly representing the interests of the Bank and its shareholders.

46. The publication and disclosure of plaintiff's loan information violated defendants' duty to maintain the privacy and confidentiality of the statements.

47. As a direct and proximate result of defendants' actions, plaintiff has been required to sell off his shares in the Bank at less than fair market value and has incurred damages in the total amount of $1,500,000.00.

48. Defendants' actions were intentional, malicious and oppressive and in conscious disregard of the rights and interests of plaintiff, with the intent to prevent plaintiff from taking an active participation in the Bank and thereby to force plaintiff to sell his shareholdings in the Bank, whereby plaintiff is entitled to an award of punitive damages in the amount of $3,000,000.00.

FOURTH CAUSE OF ACTION

[Breach of the Implied Covenant of Good Faith and Fair Dealing]

49. Plaintiff hereby repeats and realleges the allegations contained in Paragraphs 1 through 48, inclusive, and incorporates the same as though set forth in full.

50. In February, 1987, plaintiff acted as a director of Riverside National Bank. Plaintiff had served as a director since approximately 1974.

51. As of February, 1987, plaintiff was the largest shareholder of the Bank and was a depositor and a loan customer of the Bank.

52. Plaintiff, as a loan customer of the Bank, reposed trust and confidence in the Bank to maintain the financial privacy of his records. Plaintiff, as a shareholder of the Bank, reposed trust and confidence in defendants, and each of them, to protect plaintiff's rights as a shareholder, including the right to vote for and elect directors to the board.

53. Defendants, and each of them, held a duty to plaintiff to deal fairly and in good faith with plaintiff in connection with his loan transactions with the Bank. Defendants had the further duty to deal fairly and in good faith with plaintiff as a shareholder in the Bank to preserve and protect plaintiff's rights as a shareholder.

54. Defendants breached the implied covenant of good faith and fair dealing by:

(a) Formulating a plan and conspiracy to utilize plaintiff's loan defaults as the pretext for removing plaintiff from the board;

(b) Improperly removing plaintiff as a director of the corporation in violation of Corporations Code 303(c) and thereby nullifying plaintiff's rights as shareholder to elect directors;

(c) Failing to give plaintiff an opportunity to cure his loan defaults prior to the adoption of the bylaw;

(d) Utilizing plaintiff's illegal ouster from the board as a pretense for subsequently publishing confidential and private information concerning plaintiff's loan accounts with the Bank and the defaults under these loans; and

(e) Formulating and implementing this plan to force plaintiff into selling his shareholdings in the Bank.

55. As a direct and proximate result of defendants' actions, plaintiff was held up to public contempt and ridicule, plaintiff's credit relationship with the Bank was jeopardized, plaintiff's credit relationships with other banks and lending institutions was adversely affected and plaintiff was forced to sell his shareholdings in the Bank in order to pay off or otherwise cure plaintiff's credit obligations to other lending instructions.

56. As a direct and proximate result of defendants' acts, plaintiff has been required to sell off his shares of the Bank at less than their fair market value, and has incurred other damages, in the total amount of $1,500,000.00.

57. Defendants' actions were intentional, malicious and oppressive and in conscious disregard of the rights and interests of plaintiff and with the intent to prevent plaintiff from taking any participation in the Bank and to force plaintiff to sell his shareholdings in the Bank, whereby plaintiff is entitled to an award of punitive damages in the amount of $3,000,000.00.

FIFTH CAUSE OF ACTION

[Interference With Contractual Relationships]

58. Plaintiff hereby repeats and realleges the allegations contained in Paragraphs 1 through 57, inclusive, and incorporates the same as though set forth in full.

59. Plaintiff has been a shareholder of the Bank since approximately 1965, and has been an active member of the board of directors since approximately 1974. From time to time, plaintiff, or the corporations controlled by plaintiff, have been extended credit upon terms and conditions which are the same as extensions of credit to other members of the community. In 1987 plaintiff, or his companies, held loans from the Bank which were in excess of $1,000,000.00.

60. In or about February, 1987, defendants formulated a plan and conspiracy to interfere with plaintiff's business and economic relationship with the Bank and agreed with one another to take the actions as alleged herein.

61. In February, 1987, the board of directors of the Bank improperly voted to remove plaintiff as a member of the board of directors. The purported justification for the illegal removal was plaintiff's defaults, or the defaults of plaintiff' companies, on the extensions of credit by the Bank.

62. Thereafter, and in March and April, 1987, defendants, and each of them, publicized plaintiff's loan defaults.

63. In April, 1987, plaintiff entered into an agreement with the Bank of Hemet on the sale of his shares in order to cure the existing loan defaults and pay off certain loans to the Bank. In April, 1987, defendant Billings wrote to the shareholders of the Bank stating that plaintiff's agreement with the Bank of Hemet was "illegal" and not in the best interests of the Bank.

64. At all times material hereto, defendants, and each the Bank and of them, knew of plaintiff's loan contracts with plaintiff's status as a shareholder of the Bank.

65. Defendants, by these actions, intended to interfere with plaintiff's ongoing business and economic relationship with the Bank, as a shareholder, a director, and loan customer.

66. In planning to remove plaintiff as a director of the Bank based upon plaintiff's loan defaults, in removing plaintiff as a director, in subsequently publicizing plaintiff' loan defaults, and in writing to the Bank's shareholders that plaintiff had entered into an illegal contract, defendants interfered with plaintiff's business and economic relationship with the Bank as a director, shareholder and loan customer.

67. As a direct and proximate result of defendants' actions, plaintiff was ousted as a member of the board of directors, was subject to contempt and ridicule among the community and the Bank's shareholders and has had his contractual relationships with the Bank disrupted. As a direct and proximate result of defendants' action, plaintiff has sustained damages in the amount of $1,500,000.00.

68. Defendants' actions were intentional, malicious and oppressive and in conscious disregard of the rights and interests of plaintiff, with the intent to prevent plaintiff from taking an active participation in the Bank and to force plaintiff to sell his shareholdings in the Bank, wherefore plaintiff is entitled to an award of punitive damages in the amount of $3,000,000.00.

SIXTH CAUSE OF ACTION

[Interference with Contractual Relations and Prospective Advantage]

69. Plaintiff hereby repeats and realleges the allegations contained in Paragraphs 1 through 68, inclusive, and incorporates the same as though set forth in full.

70. In February, 1987, plaintiff had established banking relationships with lending institutions other than the Bank, including but not limited to Mechanic's Bank. Specifically,

plaintiff had loans from other lending institutions and had established working relationships with these lenders such that plaintiff would be granted further extensions of credit upon request.

71. Defendants, and each of them, were aware of plaintiff's relationship with these lenders, and plaintiff' prospective relationship with these lenders.

72. In February, 1987, defendants, and each of them, deliberately expelled plaintiff as a member of the board of directors. This was based upon plaintiff's loan defaults at the time. Defendants subsequently publicized this information and further publicized the fact that plaintiff had been in default on his loans with the Bank and that this necessitated plaintiff's ouster from the board of directors.

73. Defendants, and each of them, knew that the publication of this information would cause other lending institutions to either call plaintiff's loans or restrict further extensions of credit to plaintiff.

74. Defendants, and each of them, intentionally performed these acts in order to disrupt and interfere with plaintiff's relationships with these other lending institutions and to cause the lending institutions to make demand upon existing loans or to refuse further extensions of credit to plaintiff.

75. As a direct and proximate result of defendants' actions, plaintiff's banking relationships with the other lenders was disrupted, plaintiff was refused further extensions of credit, and plaintiff has been required to pay off loans with certain lenders and cure defaults on other loans with various lenders. As a direct and proximate result of defendants' actions, plaintiff has sustained damages in the amount of $1,500,000.00.

76. Defendants' actions were intentional, malicious and oppressive and in conscious disregard of the rights and

interests of plaintiff, with the intent to prevent plaintiff from taking an active participation in the Bank and to force plaintiff to sell his shareholdings in the Bank, wherefore plaintiff is entitled to an award of punitive damages in the amount of $3,000,000.00.

SEVENTH CAUSE OF ACTION

[Negligent Interference With Contractual Relationships]

77. Plaintiff hereby repeats and realleges the allegations contained in Paragraphs 1 through 76, inclusive, and incorporates the same as though set forth in full.

78. Defendants, and each of them, knew or should have know of plaintiff's relationship with these lenders and plaintiff's prospective relationship with these lenders.

79. Defendants, and each of them, were aware of plaintiff's relationship with these lenders, and plaintiff's prospective relationship with these lenders.

80. Defendants, and each of them, knew or should have known that these acts would interfere with plaintiff's relationships with the other lending institutions.

81. Defendants by their actions negligently interfered with plaintiff's contracts with the other lending institutions.

82. As a direct and proximate result of defendants' actions, plaintiff's banking relationships with the other lenders was disrupted, plaintiff was refused further extensions of credit, and plaintiff has been required to pay off loans with certain lenders and cure defaults on other loans with various lenders. As a direct and proximate result of defendants' actions, plaintiff has sustained damages in the amount of $1,500,000.00

WHEREFORE, plaintiff prays judgment against defendants,and each of them, as follows:

1. For compensatory damages in an amount to be proven at trial but estimated to exceed $50,000.00;.

2. For compensatory damages in the amount of $1,500,000.00;

3. For punitive damages in the amount of $3,000,000.00;

4. For costs of suit incurred herein; and

5. For such other and further relief as the Court may deem just and proper.

DATED: July 21, 1987 MILLER, BOYKO AND BELL

By _____

ROY MORROW BELL
FLETCHER W. PADDISON
Attorneys for Plaintiff

SECRETARY'S CERTIFICATE

I, the undersigned, do hereby certify:

1. That am the duly elected and acting Executive Vice President and Cashier of Riverside National Bank ("Bank"), a national banking association; and

2. That the following is a true and correct copy of a resolution of the Bank adopted with a quorum present at a regular meeting of the Bard of directors held on the _____ day of _____, 1987.

BE IT HEREBY RESOLVED, that ARTICLE I, Section 1.3 of the Bylaws of the Bank be, and it hereby is, amended to read as follows:

> "Section 1.3. Nominations for Director. Nominations for election to the Bard of Directors may be made by the Board of Directors or by any stockholder of any outstanding class of capital stock of the Association entitled to vote for the election of directors. Nominations, other than those made by or on behalf of the existing management of this Association, shall be made in writing and shall be delivered or mailed to the President of the Association not less than fourteen (14) days nor more than fifty (50) days prior to any meeting of stockholders called for the election of directors; provided, however, that if less than twenty-one (21) days' notice of the meeting is given to shareholders, such nomination shall be mailed or delivered to the President of this Association not later than the close of business on the seventh (7th) day following the day on which the notice of meeting was mailed. Such notifi-

EXHIBIT A

cation shall contain the following information to the extent known to the notifying shareholder: (a) the name and address of each proposed nominee; (b) the principal occupation of each proposed nominee; (c) the total number of shares of capital stock of the Association that will be voted for each purposed nominee; (d) the name and residence address of the notifying shareholder; (e) a statement setting forth with respect to such nominee whether (i) such nominee, any partnership in which such nominee is a general partner or a corporation or association in which such nominee owns or controls 25% or more of the common stock or voting power has defaulted on the payment of principal or interest on any extension of credit made by the Association to such nominee, partnership, or corporation or association or defaulted on any guarantee made by such nominee, partnership or corporation or association with respect to extensions of credit made by the Association and such default was not cured within thirty 30 days, or defaulted on any other obligation of such nominee, partnership or corporation or association to the Association; (ii) such nominee, any partnership in which such nominee is a general partner or any corporation or association in which such nominee owns or controls 25% or more of the common stock or voting power has defaulted on the payment of principal or interest on any extension of credit made by any other financial institution to such nominee, partnership, or corporation or association or defaulted on any guarantee made by such nominee with respect

to extensions of credit made by such other financial institutions and such default was not cured within thirty (30) days; and (f) the number of shares of capital stock of the Association owned by the notifying shareholder. Nominations not made in accordance herewith may, in his discretion, be disregarded by the Chairperson of the Meeting, and upon his instructions, the vote tellers may disregard all votes cast for such nominee."

BE IT FURTHER RESOLVED, that Article II of the Bylaws of the Bank be, and it hereby is, amended to include a new Section 2.8 to read as follows:

"Sections 2.8. Qualifications of Directors.

(a) In addition to qualifications prescribed by the National Bank Act for a person to be eligible to serve on the Board of Directors of the Association, no person shall be eligible to serve as a director of the Association or eligible to be a nominee to become a director of the Association for a one year period after the occurrence of any of the following:

(i) such person, any partnership in which such person is a general partner or any corporation or association in which such person owns of controls 25% or more of the common stock or voting power defaults or as of February 18, 1987 is in default on the payment of principal or interest on any extension of credit made by the Association to such person, partnership or corporation or association or defaults or as of February 18, 1987 is in default on any guarantee made by such person, partnership, or corporation or associa-

tion with respect to extensions of credit made by the Association and such default is not cured within thirty (30) days, or defaults on any other obligation of such person, partnership or corporation or association to the Association, or

(ii) such person, any partnership in which such person is a general partner or any corporation or association in which such person owns or controls 25% or more of the common stock or voting power defaults or as of February 18, 1987 is in default on the payment of principal or interest on any extension of credit made by any other financial institution to such person; partnership or corporation or association or defaults or as of February 18, 1987, is in default on any guarantees made by such person, partnership or corporation or association with respect to extensions of credit made by any other financial institution and such default is not cured within thirty (30) days.

(b) Any director who has any of the events described in Section 2.8(a) above occur to him during his term as a director shall be disqualified to continue to serve as a director of the Association and such person shall be deemed to have vacated his place on the Board of Directors of the Association as of the date any such event described in Section 2.8(a) above occurs. However, any director who has been disqualified pursuant to this section may be considered for appointment as a director at a future date which is at lest one year after the

occurrence of any event described in Section 2.8(a).

(c) Nominations received at any meeting of shareholders for a person to become a director of the Association, who has had any of the events described in Section 2.8(a) above occur to such person within a one year period prior to the date of such nomination shall be disregarded by the Chairperson of such meeting of shareholders; and upon his instructions, the vote tellers shall disregard all votes cast for such nominee."

I certify that the foregoing is true and correct to the best of my knowledge.

WITNESS MY HAND AND SEAL of said Association this _____ day of _____, 1987.

_____

J. Richard Swartz, Executive
Vice President and Cashier

(Seal)

SECRETARY'S CERTIFICATE

I, the undersigned, do hereby certify:

1. That I am the duly elected and acting Executive Vice President and Cashier of Riverside National Bank ("Bank"), a national banking association; and

2. That the following is a true and correct copy of a resolution of the Bank adopted with a quorum present at a regular meeting of the Board of Directors held on the _____ day of _____, 1987.

> BE IT HEREBY RESOLVED, that ARTICLE I, Section 1.3 of the Bylaws of the Bank be, and it hereby is, amended to read as follows:
>
> "Section 1.3. Nominations for Director. Nominations for election to the Board of Directors may be made by the Board of Directors or by any stockholders of any outstanding class of capital stock of the Association entitled to vote for the election of directors. Nominations, other than those made by or on behalf of the existing management of this Association, shall be made in writing and shall be delivered or mailed to the President of the Association not less than fourteen (14) days not more than fifty (50) days prior to any meeting of stockholders called for the election of directors; provided, however, that if less than twenty-one days' notice of the meeting is given to shareholders, such nomination shall be mailed or delivered to the President of this Association not later than the close of business on the seventh (7th) day following the day on which the notice of meeting was mailed. Such

EXHIBIT B

notification shall contain the following information to the extent known to the notifying shareholder: (a) the name and address of each proposed nominee; (b) the principal occupation of each proposed nominee; (c) a statement setting forth with respect to such nominee whether (i) such nominee, any partnership in which such nominee is a general partner or a corporation of association in which such nominee owns or controls 25% or more of the common stock or voting power has defaulted on the payment of principal or interest on any extension of credit made by the Association to such nominee,partnership, or corporation or association and such default was not cured within thirty (30) days or has defaulted on any guarantee made by such nominee, partnership or corporation or association with respect to extensions of credit made by the Association and such default has not cured within thirty (30) days, or has defaulted on any other obligation of such nominee,partnership or corporation or association to the Association and such default was not cured within thirty (30) days; (ii) such nominee, any partnership in which such nominee is a general partner or any corporation or association in which such nominee owns or controls 25% or more of the common stock or voting power has defaulted on the payment of principal or interest on any extension of credit made by another other financial institution to such nominee,partnership, or corporation or association and such default was not cured within thirty (30) days or has defaulted on any guarantee

made by such nominee, partnership, or corporation or association with respect to extensions of credit made by such other financial institution and such default was not cured within thirty (30) days; (iii) and with respect to any default specified in subparagraphs (c)(i) or (c)(ii)above information concerning the date and nature of the default, the financial institution at which such default occurred and when such default was cured; (d) the name and residence address of the notifying shareholder; and (e) the number of shares of capital stock of the Association owned by the notifying shareholder. Nominations not made in accordance herewith may, in his discretion, be disregarded by the Chairperson of the Meeting, and upon his instructions, the vote tellers may disregard all votes cast for such nominee."

BE IT FURTHER RESOLVED, that Article II of the Bylaws of the Bank be, and it hereby is, amended to include a new Section 2.8 to read as follows:

"Section 2.8 Qualification of Directors.

(a) In addition to qualifications prescribed by the National Bank Act for a person to be eligible to serve on the Board of Directors of the Association, no person shall be eligible to serve as a director of the Association or eligible to be a nominee to become a director of the Association for the period specified in Section 2.8(b) below after the occurrence of any of the following:

(i) such person, any partnership in which such person is a general partner or any

corporation or association in which such person owns or controls 25% or more of the common stock or voting power (v) defaults on the payment of principal or interest on any extension of credit made by the Association to such person, partnership or corporation or association and such default is not cured within thirty (30) days; or (w) defaults on any guarantee made by such person, partnership, or corporation or association with respect to extensions of credit made by the Association and such default is not cured within thirty (30) days, or (x) on or after February _____, 1987 is in default on the payment of principal or interest on any extension of credit made by the Association to such person, partnership or corporation or association and such default has existed for thirty (30) says or more, or (y) on or after February _____, 1987 is in default on any guarantee made by such person, partnership, or corporation or association with respect to extensions of credit made by the Association and such default has existed for thirty (30) days or more, or (z) defaults on any other obligation of such person, partnership or corporation or association to the Association and such default is not cured within thirty (30) days; or

(ii) such person, any partnership in which such person is a general partner or any corporation or association in which such person owns or controls 25% or more of the common stock or voting power (w) defaults on the payment of principal or interest on any extension of credit made by any other financial

institution to such person, partnership or corporation or association and such default is not cured within thirty (30) days; or (x) defaults on any guarantee made by such person, partnership or corporation of association with respect to extensions of credit made by any other financial institution and such default is not cured within thirty (30) days or (y) on or after February _____, 1987 is in default on the payment of principal or interest on any extension of credit made by any other financial institution to such person, partnership, or corporation or association and such default has existed for thirty (30) days or more; or (z) on or after February _____, 1987 is in default on any guarantee made by such person, partnership, or corporation or association with respect to extensions of credit made by another financial institution and such default has existed for thirty (30) days or more.

(b) Amy person who has any of the events described in Section 2.8(a) occur with respect to him shall be ineligible to serve as a director of the Association until one year after the default which occurred with respect to such person has been cured.

(c) Any director who has any of the events described in Section 2.8(a) above occur with respect to him during his term as a director shall be disqualified to continue to serve as a director of the Association and such person shall be deemed to have vacated his place on the Board of Directors of the Association as of the date any such event described in Section

2.8(a) above occurs. However, any director who has been disqualified pursuant to this section may be considered for appointment as a director at a future date which is at least one year after the default which gave rise to such disqualification has been cured.

(d) Nominations made at or received for any meeting of shareholders for a person to become a director of the Association, who has had any of the events described in Section 2.8(a) above occur to such person and such default has not been or will not have been cured for at least a one year period prior to the date of the meeting of shareholders to elect directors shall be disregarded by the Chairperson of such meeting of shareholders; and upon his instructions, the vote tellers shall disregard all votes cast for such nominee."

I certify that the foregoing is true and correct to the best of my knowledge.

WITNESS MY HAND AND SEAL of said Association this _____ day of _____, 1987.

_____

J. Richard Swartz, Executive
Vice President and Cashier

(SEAL)

H-31

CERTIFIED
RETURN RECEIPT REQUESTED

February 26, 1987

Mr. Nicholas E. Tavaglione
9000 Arlington Avenue
Riverside, California 92503

Dear Nick:

On February 26, 1987, the Board of Directors held a meting at which they adopted a new Bylaw which prescribes certain requirements for a person to be eligible to serve on the Board of Directors of the Bank. The new Bylaw provides that if a person or certain of his affiliated entities default on extensions of credit from the Bank or another financial institution and such default is not cured within 30 days or such person or his affiliated entities was in default on extensions of credit from the Bank or another financial institution as of February 26, 1987 and such default has existed for 30 days or more, such person would be ineligible to serve as a director of the Bank. The inability to serve as a director would last for a period of one year after the default was cured.

RIVERSIDE
NATIONAL
BANK RNB

As you know, you unfortunately do not meet the qualifications as set forth in the Bylaws for serving as a director of the Bank. Therefore, this is to confirm that, pursuant to the Bylaws of the Bank, you are disqualified to continue to serve as a

EXHIBIT C

director of the Bank and you are deemed to have vacated your place on the Board of Directors as of February 26, 1987.

On behalf of the Board of Directors, I want to thank you for your contributions and commitment to the Bank and express our sincere hope that you will continue to enthusiastically support the Bank. We look forward to you returning as a member of the Board of Directors as soon as possible.

Very truly yours,

Dolores M. Magnuson

Dolores M.Magnuson
Chairman of the Board

dp

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE		FOR COURT USE ONLY
TITLE OF CASE (abbreviated) NICHOLAS E. TAVAGLIONE v. MICHAEL C. BILLINGS, ET AL.		
ATTORNEY(S) NAME AND ADDRESS MILLER, BOYKO AND BELL 550 West "B" street, Suite 400 San Diego, CA 92101-3599	TELEHPONE (619) 235-4040	
ATTORNEY(S) FOR: Plaintiff	HEARING DATE-TIME-DEPT	CASE NUMBER 187341

DECLARATION OF SERVICE BY MAIL

I, DEBORAH L. TRELOAR declare: That I am, and was at the time of the service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am employed (Residing/Employed) in the County of San Diego, California, within which county the subject mailing occurred.

My Business (Residence/Business) address is 550 West "B" Street, Suite 400, (No., Street) San Diego, CA 92101-3559 (City, State). I served the following document(s)

FIRST AMENDED COMPLAINT FOR ILLEGAL OUSTER OF PLAINTIFF AS A DIRECTOR; INVASION OF PRIVACY; BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING; DEFAMATION; AND INTERFERENCE WITH CONTRACTUAL RELATIONSHIPS

(set forth exact title of document(s))

by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

STEVEN M. GOLDBERG, ESQ.
MICHAEL A. FIRESTEIN, ESQ.
ANTHONY J. TOLBERT, ESQ.
MANATT, PHELPS, ROTHENBERG & PHILLIPS
11355 West Olympic Boulevard
Los Angeles, CA 90064

I then sealed each envelope and, with the postage thereon fully prepaid, deposited each in the United States mail at San Diego California, on July 22 19 87.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on JULY 22, 19 87.

Deborah L. Treloar
(Signature)

PROOF OF SERVICE BY MAIL

APPENDIX I

MANATT, PHELPS, ROTHENBERG & PHILLIPS
STEVEN M. GOLDBERG
MICHAEL A. FIRESTEIN
ANTHONY J. TOLBERT
11355 West Olympic Boulevard
Los Angeles, California 90064
Telephone: (213) 312-4000

FILED
RIVERSIDE COUNTY
AUG 25 1987
WILLIAM E. CONERLY, Clerk
by K. Morgan Deputy

Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

NICHOLAS E. TAVAGLIONE, Plaintiff, vs. MICHAEL C. BILLINGS; DOLORES MAGNUSON; MARYANN ARCHAMBAULT; LEON SIGERMAN; J. RICHARD SWARTZ; ROY E. WHITEHEAD; RIVERSIDE NATIONAL BANK; and DOES 1 through 100, inclusive, Defendants.	CASE NO. 187341 DEMURRER BY DEFENDANTS TO PLAINTIFF'S FIRST COMPLAINT DATE: September 29, 1987 TIME: 8:30 A.M. DEPT: 11

Defendants Michael C. Billings, Dolores Magnuson, Maryann Archambault, Leon Sigerman, J. Richard Swartz, Roy E. Whitehead (the "individual defendants") and Riverside National Bank (the "Bank") hereby demur to the first amended complaint filed by plaintiff Nicholas E. Tavaglione (hereinafter "Tavaglione") on each of the following grounds:

DEMURRER TO THE FIRST CAUSE OF ACTION

1. The First Cause of Action fails to state facts sufficient to constitute a cause of action against the individual defendants who acted in their capacities as agents of the Bank.

DEMURRER TO THE SECOND CAUSE OF ACTION

2. The Second Cause of Action fails to state facts sufficient to constitute a cause of action against the individual defendants who acted in their capacities as agents of the Bank.

DEMURRER TO THE THIRD CAUSE OF ACTION

3. The Third Cause of Action fails to state facts sufficient to constitute a cause of action against the individual defendants who acted in their capacities as agents of the Bank.

DEMURRER TO THE FOURTH CAUSE OF ACTION

4. The Fourth Cause of Action fails to state facts sufficient to constitute a cause of action against any of the defendants because it fails to allege any statutory or contractual basis for a good faith duty owing from defendants to Tavaglione.

5. The Fourth Cause of Action fails to state facts sufficient to constitute a cause of action against the individual defendants who acted in their capacities as agents of the Bank.

6. The Fourth Cause of Action is uncertain because it fails to clearly set forth the acts of defendants providing the basis of the purported cause of action.

DEMURRER TO THE FIFTH CAUSE OF ACTION

7. The Fifth Cause of Action fails to state facts sufficient to constitute a cause of action against any of the defendants because a party cannot interfere with its own contractual relationship.

8. The Fifth Cause of Action fails to state facts sufficient to constitute a cause of action against the individual defendants who acted in their capacities as agents of the Bank.

9. The Fifth Cause of Action is uncertain because it fails to specify the nature of and the parties to the contractual relationships allegedly interfered with by defendants.

DEMURRER TO THE SIXTH CAUSE OF ACTION

10. The Sixth Cause of Action fails to state facts sufficient to constitute a cause of action against any of the defendants because it fails to allege that but for defendants' allegedly tortious interference, Tavaglione would have realized any economic advantage.

11. The Sixth Cause of Action fails to state facts sufficient to constitute a cause of action against the individual defendants who acted in their capacities as agents of the Bank.

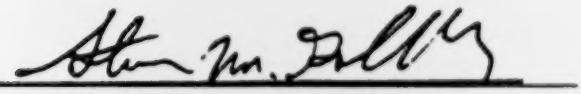
DEMURRER TO THE SEVENTH CAUSE OF ACTION

12. The Seventh Cause of Action fails to state facts sufficient to constitute a cause of action against any of the defendants because it fails to allege the existence of any duty owed by defendants to Tavaglione with respect to any contractual relationship.

13. The Seventh Cause of Action fails to state facts sufficient to constitute a cause of action against the individual defendants who acted in their capacities as agents of the Bank.

DATED: August 25, 1987.

MANATT, PHELPS, ROTHENBERG & PHILLIPS
STEVEN M. GOLDBERG
MICHAEL A. FIRESTEIN
ANTHONY J. TOLBERT

By 

STEVEN M. GOLDBERG
Attorneys for Defendants

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 11355 West Olympic Boulevard, Los Angeles, California, 90064.

On August 25, 1987, I served the foregoing document described as DEMURRER BY DEFENDANTS TO PLAINTIFF'S FIRST AMENDED COMPLAINT on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

ROY MORROW BELL, ESQ.;
FLETCHER W. PADDISON, ESQ.
MILLER, BOYKO AND BELL
550 West "B" Street, Suite 400
San Diego, CA. 92101-3599

/X/ **(BY MAIL)** I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on August 25, 1987, at Los Angeles, California.

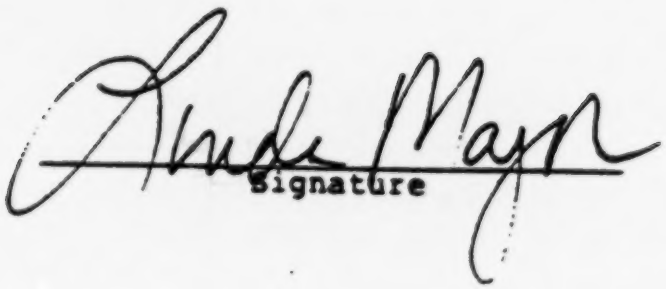
/ / **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on August 25, 1987, at Los Angeles, California.

/X/ **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/ / **(Federal)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

LINDA MAJOR
(Type or Print Name)



MANATT, PHELPS, ROTHENBERG & PHILLIPS
STEVEN M. GOLDBERG
MICHAEL A. FIRESTEIN
ANTHONY J. TOLBERT
11355 West Olympic Boulevard
Los Angeles, California 90064
Telephone: (213) 312-4000

FILED
RIVERSIDE COUNTY
AUG 25 1987
WILLIAM E. CONERLY, Clerk
by K. Morgan Deputy

Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

NICHOLAS E. TAVAGLIONE, Plaintiff, vs. MICHAEL C. BILLINGS; DOLORES MAGNUSON; MARYANN ARCHAMBAULT; LEON SIGERMAN; J. RICHARD SWARTZ; ROY E. WHITEHEAD; RIVERSIDE NATIONAL BANK; and DOES 1 through 100, inclusive, Defendants.	CASE NO. 187341 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' DEMURRER TO PLAINTIFF'S FIRST AMENDED COMPLAINT

I.

INTRODUCTORY STATEMENT

On July 9, 1987, this Court sustained in substantial part defendants' demurrer to plaintiff Nicholas E. Tavaglione's ("Tavaglione") original complaint. Tavaglione has filed an amended complaint. Unfortunately, Tavaglione's amended complaint has not cured many of the defects found in his original complaint.

This demurrer to the amended complaint is submitted on behalf of defendants Michael C. Billings, Dolores Magnuson, Maryann Archambault, Leon Sigerman, J. Richard Schwartz, Roy E. Whitehead (the "individual defendants") and Riverside National Bank (the "Bank"). Tavaglione filed this action after the Bank, by its board of directors, passed a bylaw (hereinafter the "bylaw") to regulate the internal affairs of the Bank with respect to the qualifications of board directors.

Once again, Tavaglione has failed to allege facts sufficient to constitute a cause of action against the Bank in connection with his fourth, fifth, sixth and seventh causes of action. Moreover, because the amended complaint admits that the individual defendants acted at all times within the course and scope of their agency on behalf of the Bank, Tavaglione has failed to allege facts sufficient to state a cause of action against the individual defendants with respect to any of his causes of action.

II.

FACTS

For purposes of this demurrer, all of Tavaglione's allegations are assumed to be true. Those allegations are summarized below.

In or about April, 1986, at the Bank's annual shareholders' meeting, Tavaglione was elected as a member of the board of directors of the Bank. See Complaint at ¶18. As of February 3, 1987, Tavaglione had loans from the Bank which had been in default for periods in excess of thirty (30) days. Id. at ¶11. On or about February 3, 1987, Tavaglione was advised that the board of directors was considering adopting a bylaw which would regulate the appointment and qualification of board directors. Id. at ¶19. On or about February 26, 1987, Tavaglione was informed by the board that, pursuant to the adopted bylaw, Tavaglione had been disqualified to serve as a director of the Bank and was consequently deemed to have vacated his place on the board. Id. at ¶17 and Exhibit "C" incorporated therein by reference.

Tavaglione became furious and this lawsuit ensued.

III.

ARGUMENT

A. Tavaglione's Fourth Cause Of Action For Breach Of The Implied Covenant Of Good Faith And Fair Dealing Fails To State A Cause Of Action And Is Uncertain.

Defendants successfully demurred to the fourth cause of action in Tavaglione's original complaint. Tavaglione has not cured the defects in that cause of action in his amended complaint.

Initially, it is impossible to determine the source of the duty of good faith alleged by Tavaglione to be owed to him. No contract is alleged, nor is any statutory basis for a good faith duty set forth by Tavaglione. At the very least, more explicit averments supporting this purported cause of action should be required. Whatever Tavaglione's theory may be, his amended complaint fails to allege sufficient facts to state a cause of action. If Tavaglione is seeking contract remedies for the bad faith breach of a contract, his attempt must fail as a matter of law, because, as noted above, no contract is alleged or described. Additionally, no breach of a contract is alleged.

Tavaglione's allegations in support of this purported cause of action can be reduced to the following conclusory statement: "Defendants, and each of them, held a duty to plaintiff to deal fairly and in good faith with plaintiff in connection with his loan transactions with the Bank. . . and to preserve and protect plaintiff's rights as a shareholder." See Complaint at ¶53. In asserting the existence of this "duty" on the part of defendants, Tavaglione has failed to allege any facts to support his allegation. Significantly, in light of Tavaglione's admission that he was the "largest shareholder of the Bank" [Complaint at ¶51], the elements of public interest,

adhesion and unequal bargaining power necessary to create the "special relationship" required to maintain a cause of action for breach of the implied covenant of good faith and fair dealing are absent. See, e.g., Seaman's Direct Buying Service, Inc. v. Standard Oil Co. of California, Inc., 36 Cal.3d 752, 206 Cal.Rptr. 354 (1984); Commercial Cotton Co. v. United California Bank, 163 Cal.App.3d 511, 209 Cal.Rptr. 551 (4th Dist. 1985).

It is therefore clear that Tavaglione's fourth cause of action is once again subject to demurrer on the grounds that it fails to allege sufficient facts to state a cause of action. Additionally, it is not certain from the complaint whether Tavaglione's fourth cause of action is based upon the adoption of the bylaw, or upon some other grounds. Finally, it is impossible to ascertain whether Tavaglione is setting forth this cause of action in his capacity as a shareholder or as a loan customer of the Bank. Accordingly, defendants cannot reasonably respond to Tavaglione's uncertain allegations in this fourth cause of action.

Based on the foregoing reasons, defendants' demurrer to the fourth cause of action for breach of the implied covenant of good faith and fair dealing should be sustained.

B. Tavaglione's Fifth Cause Of Action For Interference With Contractual Relationships Fails To State A Cause Of Action And Is Uncertain.

Tavaglione also has failed to cure his fifth cause of action for interference with contractual relationships. To state a cause of action for tortious interference with contract, the complaint must allege the existence of a valid contract, that the defendant had knowledge of the contract and intended to induce its breach, that the contract was in fact breached, that the breach was caused by the defendant's wrongful acts, and that there has been injury to the plaintiff. Dryden v. Tri-Valley Growers, 65 Cal.App.3d 990, 135 Cal.Rptr. 720 (1st Dist. 1977). Tavaglione has neglected to include virtually all of the allegations essential to maintaining this cause of action.

Moreover, the complaint is entirely uncertain as to the contracting parties purportedly forming the alleged contractual relationships. Tavaglione alleges that Riverside "intended to interfere with plaintiff's ongoing business and economic relationship with the Bank, as a shareholder, a director, and a loan customer." See Complaint at ¶65. However, it is clear as a matter of law that an action for interference with contractual relationships does not lie against another party to the contract, but can only arise upon the wrongful acts of a third party. Id., 65 Cal.App.3d at 999; Kelly v. General Telephone Co., 136 Cal.App.3d 278, 288, 186 Cal.Rptr. 184, 188 (2d Dist. 1982).

Consequently, the fifth cause of action fails to state sufficient facts to constitute a cause of action and is uncertain as to the nature of and parties to any purported contractual relationships. As a result, this Court should once again sustain the demurrer to Tavaglione's fifth cause of action.

C. Tavaglione's Sixth Cause Of Action For Interference With Contractual Relations Fails To State A Cause of Action.

In much the same manner as with the fifth cause of action, Tavaglione has failed to allege essential facts in support of his sixth cause of action for interference with contractual relations and prospective advantage. Initially, it should be pointed out that Tavaglione has attempted to combine two separate and distinct causes of action (interference with contractual relations and interference with prospective economic advantage) into one cause of action. With respect to the tort of interference with prospective advantage, the following elements must be stated: (1) An economic relationship between plaintiff and a third party containing the probability of future economic benefit to the plaintiff; (2) knowledge on the part of the defendant of this relationship; (3) acts by the defendant intended to disrupt the relationship; (4) actual disruption of the relationship; and (5) resulting damages to the plaintiff. Buckaloo v. Johnson, 14 Cal.3d 815, 122 Cal.Rptr. 745 (1975); Asia Investment Co. v. Borowski, 133 Cal.App.3d 832, 184 Cal.Rptr. 317 (3d Dist. 1982).

Tavaglione's sixth cause of action in his Complaint is deficient in that it fails to meet the first element stated above. Specifically, Tavaglione has failed to allege that but for the defendants' allegedly tortious conduct, Tavaglione would have consummated the "deal" with any third party and realized an economic advantage. In Wilson v. Loew's Inc., 142 Cal.App.2d 183, 298 P.2d 152 (2d Dist. 1956), the court stated:

> . . . it is essential to a cause of action for unlawful interference with business interest that it appear that, except for the interference of the defendant, there was a reasonable prob-

> ability that plaintiff would have entered into a contract or made a profit. (Emphasis added.)

Id. at 192. See also, Chicago Title Ins. Co. v. Great Western Financial Corp., 69 Cal.2d 305, 70 Cal.Rptr. 849 (1968). Once again, this Court should sustain the demurrer to Tavaglione's sixth cause of action.

D. Tavaglione's Seventh Cause of Action For Negligent Interference With Contractual Relationships Fails To State A Cause of Action.

Although an action can be maintained for negligent interference with contractual relationships, an essential allegation of that cause of action is that there existed a duty of care owed by the defendant to the plaintiff with respect to the purported contractual relationships. Chameleon Engineering Corp. v. Air Dynamics, Inc., 101 Cal.App.3d 418, 161 Cal.Rptr. 463 (5th Dist. 1980); cf. J'Aire Corporation v. Gregory, 24 Cal.3d 799, 157 Cal.Rptr. 407 (1979).

In determining whether a defendant owes a plaintiff a duty with respect to a particular contractual relationship, the court in Chameleon set forth the following criteria: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injuries suffered by the plaintiff; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm.

Tavaglione's amended complaint has failed to allege virtually all of these required elements. Accordingly, Tavaglione's seventh cause of action is also subject to demurrer for failure to allege facts sufficient to constitute a cause of action.

E. Tavaglione's Amended Complaint Fails To State Causes Of Action Against The Individual Defendants Who Acted In Their Capacities As Agents Of The Bank.

In his amended complaint, Tavaglione admits that "defendants, and each of them, were the agents, employees and servants of each other, and that at all times relevant hereto, said defendants were acting within the course, scope and purpose of such agency, service and employment." See Complaint at ¶5.

It is a well-settled rule of law that an agent of a corporation is immune from liability unless there are facts alleged from which it is shown that the individual agent was acting in a capacity other than as an agent of the corporation. See Wise v. Southern Pacific Co., 223 Cal.App.2d 50, 35 Cal.Rptr. 652 (1st Dist. 1963): Martin v. Jacuzzi, 224 Cal.App.2d 549, 36 Cal.Rptr. 880 (1st Dist. 1964). As the court in Wise stated:

> Agents and employees of a corporation cannot conspire with their corporate principal or employer when they act in their official capacities on behalf of the corporation and not as individuals for their individual advances [citations omitted]. This rule derives from the principle that obviously corporate agents and employees acting for and on behalf of the corporation cannot be held liable for inducing a breach of the corporation's contract since being in a confidential relationship to the corporation their action in this respect is privileged.

Id. at 72-73.

Moreover, in instances where a complaint alleges that individual defendants were the agents and employees of a defendant employer and were acting within the course or scope of their employment in committing the acts alleged, California courts have adopted a "managerial privilege" to shield the individual employees/agents from liability as defendants with respect to certain causes of action. See Scopas v. Armstrong World Industries, 114 LRRM 2933 (C.D. Cal. 1983) appeal docketed, No. 84-5706 (9th Cir. 1984); Becket v. Welton Becket & Associates, 39 Cal.App.3d 815, 114 Cal.Rptr. 531 (2d Dist. 1974). Specifically, the managerial privilege protects employers' agents, acting within the scope of their agency, from liability for causes of action rooted in contract, such as interference with contractual relations, interference with prospective business advantage and breach of the implied covenant of good faith and fair dealing. As discussed above, Tavaglione's amended complaint admits that the individual defendants were agents of the Bank and, at all material times were acting within the course and scope of their agency. See Complaint at ¶5.

In Scopas, supra, a wrongful termination action was filed against the employer as well as the employee's supervisory manager. In determining that the manager had been "fraudulently joined" as a party to create diversity jurisdiction, the court concluded that plaintiff could not possibly establish any liability against the defendant/manager. Specifically, the court rejected plaintiff's argument that the manager, as the agent of the employer, committed the tort of wrongful interference with contractual relations by inducing the breach of plaintiff's employment contract. In outlining the contours of the managerial privilege, the court stated:

> [A]gents of employers, acting in the scope of their authority, are shielded from liability by the privilege of "managerial immunity." [cita-

> tions omitted] The Court finds no question of fact regarding Underwood's [defendant/manager] agency status. Indeed, plaintiff's papers repeatedly emphasize that Underwood, as "Supervisory Manager in the L.A. area," acted within the scope of his authority as Armstrong's [defendant/ employer] agent in terminating plaintiff. The Court concludes that the "managerial immunity" of Underwood precludes any recovery by plaintiff against him.

Id. at 2934-2935.

As alleged by Tavaglione, the individual defendants of the Bank's board of directors in the instant action are agents of the Bank, much in the same manner that the defendant manager was an agent of the employer in Scopas. As such, all of the causes of action set forth by Tavaglione in his amended complaint are subject to demurrer pursuant to the managerial privilege. Accordingly, the amended complaint must be dismissed, at least with respect to the individual defendants.

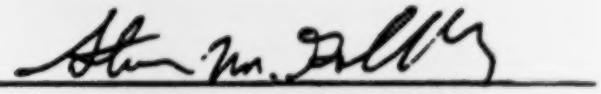
IV.

CONCLUSION

Tavaglione's amended complaint has failed to cure many of the defects found by this Court in the original complaint. Specifically, the fourth, fifth, sixth and seventh causes of action set forth in Tavaglione's Complaint fail to allege sufficient facts to constitute causes of action against the Bank. Moreover, the amended complaint fails to allege facts sufficient to state any cause of action against the individual defendants because Tavaglione admits that the individual defendants were acting at all times as agents for the Bank. Accordingly, defendants respectfully submit that their demurrer should be sustained.

DATED: August 25, 1987.

MANATT, PHELPS, ROTHENBERG & PHILLIPS
STEVEN M. GOLDBERG
MICHAEL A. FIRESTEIN
ANTHONY J. TOLBERT

By 
STEVEN M. GOLDBERG
Attorneys for Defendants

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 11355 West Olympic Boulevard, Los Angeles, California, 90064.

On August 25, 1987, I served the foregoing document described as MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' DEMURRER TO PLAINTIFF'S FIRST AMENDED COMPLAINT on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

ROY MORROW BELL, ESQ.;
FLETCHER W. PADDISON, ESQ.
MILLER, BOYKO AND BELL
550 West "B" Street, Suite 400
San Diego, CA. 92101-3599

/X/ **(BY MAIL)** I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on August 25, 1987, at Los Angeles, California.

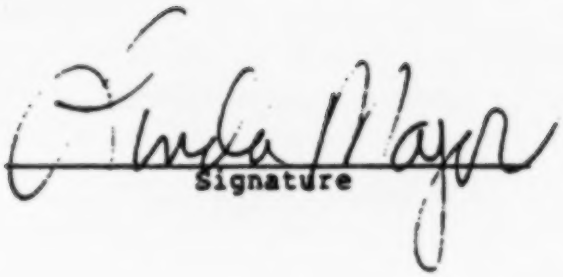
/ / **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on August 25, 1987, at Los Angeles, California.

/X/ **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/ / **(Federal)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

LINDA MAJOR
(Type or Print Name)



APPENDIX J

MILLER, BOYKO and BELL
A Professional Corporation
550 West "B" Street, Suite 400
SAN DIEGO, CALIFORNIA 92101-3599
(619) 235-4040

Attorneys for Plaintiff

FILED
RIVERSIDE COUNTY
NOV 20 1987
WILLIAM E. CONERLY, Clerk
By J. Pascual, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

NICHOLAS E. E.TAVAGLIONE,	CASE NO. 187341
Plaintiff,	NOTICE OF RULING
vs.	
MICHAEL C. BILLINGS; DOLORES MAGNUSON; MARYANN ARCHAMBAULT; LEON SIGERMAN; J. RICHARD SWARTZ; ROY E. WHITEHEAD; RIVERSIDE NATIONAL BANK; and DOES 1 through 100, inclusive,	
Defendants.	

TO: DEFENDANTS, AND TO THEIR ATTORNEYS OF RECORD, MANATT, PHELPS, ROTHENBERG & TUNNEY:

PLEASE TAKE NOTICE that the demurrers of the defendants came on regularly for hearing on November 13, 1987. No appearances by counsel were made, with the matter having been submitted upon the tentative ruling of the Court. Pursuant to this, Court overruled the demurrers by the defendants, giving the defendants 20 days in which to answer the complaint.

DATE: November 16, 1987

MILLER, BOYKO AND BELL

By _____
FLETCHER W. PADDISON
Attorneys for Plaintiff

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE		FOR COURT USE ONLY
TITLE OF CASE (abbreviated) NICHOLAS E. TAVAGLIONE v. MICHAEL C. BILLINGS, ET AL.		
ATTORNEY(S) NAME AND ADDRESS MILLER, BOYKO AND BELL 550 West "B" street, Suite 400 San Diego, CA 92101-3599	TELEHPONE (619) 235-4040	
ATTORNEY(S) FOR: Plaintiff	HEARING DATE-TIME-DEPT	CASE NUMBER 187341

DECLARATION OF SERVICE BY MAIL

I, DEBORAH L. TRELOAR declare: That I am, and was at the time of the service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am employed (Residing/Employed) in the County of San Diego, California, within which county the subject mailing occurred.

My San Diego address is 550 West "B" Street, Suite 400, San Diego, CA 92101-3559. I served the following document(s)

NOTICE OF RULING

by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

STEVEN M. GOLDBERG, ESQ.
MICHAEL A. FIRESTEIN, ESQ.
ANTHONY J. TOLBERT, ESQ.
MANATT, PHELPS, ROTHENBERG & PHILLIPS
11355 West Olympic Boulevard
Los Angeles, CA 90064

I then sealed each envelope and, with the postage thereon fully prepaid, deposited each in the United States mail at San Diego California, on November 16 19 87.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 16, 19 87.

Deborah L. Treloar
(Signature)

PROOF OF SERVICE BY MAIL

APPENDIX K

MANATT, PHELPS, ROTHENBERG & PHILLIPS
STEVEN M. GOLDBERG
JEFF E. SCOTT
11355 West Olympic Boulevard
Los Angeles, California 90064
(213) 312-4000

Attorneys for Defendants

FILED
RIVERSIDE COUNTY
DEC 14 1987
WILLIAM E. CONERLY, Clerk
By K. La Pier Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

NICHOLAS E. TAVAGLIONE, Plaintiff, vs. MICHAEL C. BILLINGS; DOLORES MAGNUSON; MARYANN ARCHAMBAULT; LEON SIGERMAN; J. RICHARD SWARTZ; ROY E. WHITEHEAD; RIVERSIDE NATIONAL BANK; and DOES 1 through 100, inclusive, Defendants.	CASE NO. 187341 ANSWER OF DEFENDANTS TO UNVERIFIED COMPLAINT

In answer to the unverified complaint (the "Complaint") of plaintiff Nicholas E. Tavaglione ("Tavaglione"), defendants Michael C. Billings ("Billings"), Maryann Archambault ("Archambault"), Leon Sigerman ("Sigerman"), J. Richard Swartz ("Swartz"), Roy E. Whitehead ("Whitehead") and Riverside National Bank ("Riverside") (collectively referred to as "defendants") deny, generally and specifically, each and every allegation of the Complaint pursuant to 431.30(d) of the California Code of Civil Procedure.

FIRST AFFIRMATIVE DEFENSE

The Complaint, and each of the alleged causes of action therein, fails to state facts sufficient to constitute a valid cause of action against defendants.

SECOND AFFIRMATIVE DEFENSE

The Complaint, and each of the alleged causes of action therein, fails to state facts sufficient to entitle plaintiff to exemplary and punitive damages.

THIRD AFFIRMATIVE DEFENSE

No relief may be obtained under the Complaint by reason of the doctrine of estoppel.

FOURTH AFFIRMATIVE DEFENSE

No relief may be obtained under the Complaint by reason of the doctrine of unclean hands.

FIFTH AFFIRMATIVE DEFENSE

Tavaglione has failed to mitigate damages, if in fact any damages have been sustained, and any recovery by Tavaglione should be diminished or barred by reason thereof.

SIXTH AFFIRMATIVE DEFENSE

No relief may be obtained under the Complaint pursuant to the "at-will" employment policy of the National Bank Act, 12 U.S.C. § 1, et seq.

SEVENTH AFFIRMATIVE DEFENSE

No relief may be obtained under the Complaint because a national banking institution, such as Riverside, has an inherent right to adopt reasonable bylaws regulating its internal affairs and may properly establish qualifications for the members of its board of directors.

EIGHTH AFFIRMATIVE DEFENSE

Tavaglione may not obtain relief under the Complaint based on the alleged disclosure or publication of information respecting Tavaglione's loans which were in default, Tavaglione's ouster from the board of directors of Riverside, or any other facts, to the extent that Tavaglione, and not defendants, published or caused to be published, the above-described information.

NINTH AFFIRMATIVE DEFENSE

Tavaglione may not obtain relief under the Complaint based on the alleged disclosure or publication of information respecting Tavaglione's loans which were in default, or Tavaglione's ouster from the board of directors of Riverside because such alleged disclosure or publication is privileged pursuant to Civil Code § 47(3).

TENTH AFFIRMATIVE DEFENSE

Tavaglione may not obtain relief under the Second Cause of Action alleged in the Complaint because the statements that defendants allegedly published or caused to be published were true.

ELEVENTH AFFIRMATIVE DEFENSE

No relief may be obtained under the Complaint against the individual defendants, i.e., Billings, Magnuson, Archambault, Sigerman, Swartz and Whitehead, because the individual defendants were the directors, officers and agents of Riverside acting within the course or scope of their agency

and were protected by the managerial privilege in committing the acts alleged.

TWELFTH AFFIRMATIVE DEFENSE

No relief may be obtained under the Complaint based on defendants' publication in a proxy statement to Riverside's shareholders that Tavaglione was a guarantor of a substantial loan and that such loans were in default, because such disclosure is required pursuant to the Securities Exchange Disclosure Rules issued by the Comptroller of the Currency pursuant to Section 12(i) of the Securities Exchange Act of 1934.

WHEREFORE, defendants pray for relief as follows:

1. That Tavaglione take nothing by way of his Complaint;

2. That judgment be entered in favor of defendants;

3. For costs of suit herein; and

4. For such other and further relief as this Court may deem just and proper.

DATED: December 14, 1987

MANATT, PHELPS, ROTHENBERT & PHILLIPS
STEVEN M. GOLDBERT
JEFF E. SCOTT

By _____
JEFF E. SCOTT
Attorneys for Defendants

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 11355 West Olympic Boulevard, Los Angeles, California, 90064.

On December 14, 1987, I served the foregoing document described as Answer of Defendants to Unverified Complaint on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Roy Morrow Bell, Esq.
Fletcher W. Paddison, Esq.
Miller, Boyko and Bell
550 West "B" Street, Suite 400
San Diego, CA. 92101-3599

/X/ **(BY MAIL)** I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on December 14, 1987, at Los Angeles, California.

/ / **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on December 14, 1987, at Los Angeles, California.

/X/ **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/ / **(Federal)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Teresa A. Pagan
(Type or Print Name)

Signature

APPENDIX L

Section 1 of the Fourteenth Amendment to the Constitution of the United States of America provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX M

§375b. Prohibitions respecting loans and extension of credit to executive officers and directors of banks, political or campaign committees, etc.

. . . .

(3) No member bank shall make any loan or extension of credit in any manner to any of its executive officers or directors, or to any person who directly or acting through or in concert with one or more persons, owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank, or to any company controlled by such executive officer, director, or person, or to any political or campaign committee the funds or services of which will benefit such executive officer, director, or person or which is controlled by such executive officer, director, or person, unless such loan or extension of credit is made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

APPENDIX N

§1818. Termination of status as insured depository institution.

(a) Termination of Insurance

. . .

(2) Involuntary termination

(A) Notice to primary regulator

If the Board of Directors determines that --

(i) an insured depository institution or the directors or trustees of an insured depository institution have engaged or are engaging in unsafe or unsound practices in conducting the business of the depository institution;

(ii) an insured depository institution is in an unsafe or unsound condition to continue operations as an insured institution; or

(iii) an insured depository institution or the directors or trustees of the insured institution have violated any applicable law, regulation, order, condition imposed in writing by the Corporation in connection with the approval of any application or other request by the insured depository institution, or written agreement entered into between the insured depository institution and the Corporation,

the Board of Directors shall notify the appropriate Federal banking agency with respect to such institution (if other than the Corporation) or the State banking supervisor of such institution (if the Corporation is the appropriate Federal

banking agency) of the Board's determination and the facts and circumstances on which such determination is based for the purpose of securing the correction of such practice, condition, or violation. Such notice shall be given to the appropriate Federal banking agency not less than 30 days before the notice required by subparagraph (B), except that this period for notice to the appropriate Federal banking agency may be reduced or eliminated with the agreement of such agency.

(B) Notice of intention to termination insurance

If, after giving the notice required under subparagraph (A) with respect to an insured depository institution, the Board of directors determines that any unsafe or unsound notice or condition or any violation specified in such notice requires the termination of the insured status of the insured depository institution, the Board shall --

(i) serve written notice to the insured depository institution of the Board's intention to terminate the insured status of the institution;

(ii) provide the insured depository institution with a statement of the charges on the basis of which the determination to terminate such institution's insured status was made (or a copy of the notice under subparagraph (A)); and

(iii) notify the insured depository institution of the date (not less than 30 days after notice under this subparagraph) and place for a hearing before the Board of Directors (or any person designated by the Board) with respect to the termination of the institution's insured status.

APPENDIX O

§215.4 General prohibitions.

(a) *Terms and creditworthiness.* No member bank may extend credit to any of its executive officers, directors, or principal shareholders or to any related interest of that person unless the extension of credit:

(1) Is made on substantially the same terms (including interest rates and collateral) as, and following credit underwriting procedures that are not less stringent than, those prevailing at the time for comparable transactions by the bank with other persons that are not covered by this part and who are not employed by the bank; and

(2) Does not involve more than the normal risk of repayment or present other unfavorable features.

. . . .

(c) *Lending limit.* No member bank may extend credit to any of its executive officers, directors, or principal shareholders or to any related interest of that person in an amount that, when aggregated with the amount of all other extensions of credit by the member bank to that person and to all related interests of that person, exceeds the lending limit of the member bank specified in § 215.2(h) of this part. This prohibition does not apply to an extension of credit by a member bank to a company of which the member bank is a subsidiary or to any other subsidiary of that company.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on April 15, 1994, I served the within *Appendix to Petition For Writ of Certiorari (Volume 2 of 2)* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(By Express Mail: Original and 40 Copies)

Clerk, California Court of Appeal
Fourth Appellate District
Division Two
303 West Fifth Street
San Bernardino, California 92401

Clerk of the Superior Court
for the County of Riverside
Honorable John P. Carroll, Judge
County Courthouse
4050 Main Street
Riverside, California 92501

Clerk of the Superior Court
for the County of Riverside
Indio Branch
Honorable H. Morgan Dougherty, Judge
Department C
46-209 Oasis Street
Indio, California 92201

Mr. Roy Morrow Bell
Mr. Fletcher W. Paddison
Miller, Boyko and Bell
550 West "B" Street, Suite 400
San Diego, California 92101-3599
Attorneys for Plaintiff,
Mr. Nicholas E. Tavaglione

Superior Court Clerk
Riverside County
Post Office Box 431 -- Appeals
Riverside, California 92502

Mr. Raymond Pepper
Miller, Boyko and Bell
550 West "B" Street, Suite 400
San Diego, California 92101-3599

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 15, 1994, Los Angeles, California.

Betty J. Malloy
(*Original Signed*)

Supreme Court, U.S.
FILED
MAY 18 1994
OFFICE OF THE CLERK

(5)

93-1640

No. _____

In The
Supreme Court of the United States
October Term, 1993

NICHOLAS E. TAVAGLIONE,

Respondent,

vs.

MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT, J. RICHARD SWARTZ, ROY E. WHITEHEAD, and RIVERSIDE NATIONAL BANK,

Petitioners.

Petition for Writ of Certiorari to the California Court of Appeal

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Roy Morrow Bell, Esq.
Fletcher W. Paddison, Esq.
Raymond Pepper, Esq.
Miller, Boyko and Bell
550 West "B" Street, Suite 400
San Diego, California 92101
Telephone: (619) 235-4040

Attorneys for Respondent
NICHOLAS E. TAVAGLIONE

33 p

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUMMARY OF ISSUES PRESENTED FOR REVIEW. . 2

OPINION AND JUDGMENT BELOW. 3

ARGUMENT 10

I. There Is No Jurisdiction Over the Questions Presented for Review and Defendants Have Failed to Preserve Any Claim of Error. 10

A. Defendants Have Failed to Raise a Federal Question Meriting Review. 10

B. Defendants Have Failed to Preserve this Issue for Appeal. 12

II. There Is No Basis For Review Of Plaintiff's Cause of Action For Breach Of The Implied Covenant Of Good Faith And Fair Dealing. 16

A. Defendants had "Fair Notice" of Plaintiff's Claims. 18

B. This Decision Is Not Preempted by Federal Law. . . .22

CONCLUSION 25

TABLE OF AUTHORITIES

Cases	Page(s)
Anderson National Bank v. Luckett, 321 U. S. 233, 64 S. Ct. 599 (1944)	22, 23
Bertero v. National Gen. Corp., 13 Cal.3d 43, 59 (1974)	14
California Federal Savings & Loan Association v. Guerra, 479 U.S. 272, 281, 107 S.Ct. 683, 689 (1987)	23
Cardinale v. Lousiana, 394 U.S. 437, 438, 89 S. Ct. 1161, 1162 (1969)	3, 11
Conley v. Gibson, 355 U.S. 41 (1957)	18
Davis & Cox v. Summa Corp., 751 F.2d 1507, 1522 (9th Cir. 1985)	18, 20
Delia S. v. Torres, 134 Cal.App.3d 471, 481 (1982)	14
Dorsic v. Kurtin, 19 Cal.App.3d 226, 239 (1971)	15
Downing v. Barrett Mobile Home Transport, Inc., 38 Cal.App.3d 519 (1974)	14
Fowler v. Security First National Bank, 146 Cal.App.2d 37, 303 P.2d 565 (1956)	24
Frangos v. Doering Equipment Corp., 860 F.2d 70, 74 (1988)	18

TABLE OF AUTHORITIES - CONTINUED

Cases **Page(s)**

General Talking Pictures Corp. v. Western Electric Company, 304 U.S. 175, 178, 58 S.Ct. 849, 851 (1938) 5

In re Estate of Martin, 270 Cal.App.2d 506 (1969) 14

LeMons v. The Regents of the University of California, 21 Cal.3d 869 (1978) 15

Louisiana Public Service Commission v. Federal Commission, 476 U.S. 355, 369, 106 S. Ct. 1890 (1986) 23

National Bank v. Commonwealth, 76 U.S. 353, 362, 19 L.Ed 701 (1870) 24

National Labor Relations Board v. Pittsburgh S. S. Co., 340 U.S. 498, 503, 71 S.Ct. 453, 456 (1951) 5, 11

National State Bank, Elizabeth, N.J. v. Long, 630 F.2d 981, 985 (3rd Cir. 1980) 24

New Motor Vehicle Board of the State of California v. Orrin W. Fox Company, 439 U.S. 96, 125, n. 29 (1978) 18

Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 714 (8th Cir. 1979) 18

TABLE OF AUTHORITIES - CONTINUED

Cases **Page(s)**

Redevelopment Agency v. First Christian Church of Long Beach, 140 Cal.App.3d 690 (1983) 14

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74, 75 S.Ct. 614, 616 (1955) 11

Security First National Bank v. Rospaw, 107 Cal.App.2d 220, 237 P.2d 76 (1951) 24

Self Directed Placement Corp. v. Control Data Corp., 908 F.2d 462, 466 (9th Cir. 1990) 18

Shaw v. Delta Airlines, Inc., 463 U.S. 85, 95-98 (1983) 23

Tavaglione v. Billings, 4 Cal.4th 1150 . . . . . 4, 9, 10, 13

United States v. Spector, 343 U.S. 169, 72 S.Ct. 591 (1952) 22

Wichita Eagle and Bekin Publishing Co., Inc. v. Pacific National Bank, 493 F.2d 1285 (9th Cir. 1974) 24

Wickham v. Southland Corp., 168 Cal.App.3d 49 (1985) 14

Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 111 S.Ct. 2476, 2481 (1991) 22, 24

TABLE OF AUTHORITIES - CONTINUED

Constitutions **Page(s)**

U.S. Constitution

Article VI, clause 2 22

Rules

United States Supreme Court

Rule 14.1(h) 11

Federal Rules of Civil Procedure

Rule 8 18

Rule 15(b) 18

California Rule of Court

Rule 29(a)(i) 11

Statutes

12 U.S.C.

Section 375b 3, 15, 17, 22, 23

Section 1818 25

Other

9 *Witkin*, California Procedure, Appeal

Section 301 (3d ed. 1985) 15

No. _____

In The

Supreme Court of the United States

October Term, 1993

NICHOLAS E. TAVAGLIONE,

Respondent,

vs.

MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT, J. RICHARD SWARTZ, ROY E. WHITEHEAD, and RIVERSIDE NATIONAL BANK,

Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE WILLIAM H. REHNQUIST, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Nicholas E. Tavaglione respectfully requests that this Court deny the Petition for Writ of Certiorari (the "Petition"). The Petition misrepresents the evidence at trial, and the findings of the California Courts, fails to set forth a legitimate basis for review by the Supreme Court, and does not demonstrate that the "Questions Presented for Review" have been preserved for appeal.

SUMMARY OF ISSUES PRESENTED FOR REVIEW

Question No. (1): Does a state court judgment violate the Fourteenth Amendment's requirement of due process of law by holding defendants[1] liable on the cause of action for breach of the implied covenant of good faith and fair dealing which allegedly was never pled or proven at trial?

Response: The complaint in this matter specifically pled a cause of action for breach of the implied covenant of good faith and fair dealing. Defendants introduced evidence on this cause of action at trial, submitted jury instructions and thereafter extensively argued the substantiality of the evidence supporting this issue on appeal. Defendants, at all times, had "fair notice" of this cause of action.

Question No. (2): Is the state court cause of action against a bank for breach of the implied covenant of good faith and fair dealing preempted?

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[1]For continuity purposes, petitioners shall be referred to herein as "defendants," consistent with the appellate practice in California.

Response: This issue is raised for the first on appeal and has been waived. The issue has never been raised, preserved or passed upon in the state courts below.

In addition, there is no conflict with federal law. Contracts of national banks are generally governed by state law. Here, the trial court gave an instruction, at defendants' request, based upon 12 U.S.C. § 375b and the jury made a finding that this loan did not present more than a normal risk of repayment [JA 1641]. This finding was supported by substantial evidence, and it was never challenged on appeal. Plaintiff's loans were well secured, the Bank did not believe this loan was unsafe and plaintiff has repaid all of his loans. The Court of Appeal held that there was substantial evidence to support a finding that the Bank's refusal to renew to the loan was not based upon plaintiff's credit but was based solely on defendants' intention to remove plaintiff as a director.

OPINION AND JUDGMENT BELOW

On March 10, 1989, judgment was entered against defendants in the Superior Court of the County of Riverside pursuant to jury verdict. The jury's general verdict was supported by answers to special interrogatories. The jury found for plaintiff on each cause of action submitted for illegal removal of a corporate director, defamation, breach of the implied covenant of good faith and fair dealing, interference with contractual relations and intentional and negligent interference with prospective economic advantage.

"[W]here several counts are tried, a general verdict will be sustained if any one count is supported by substantial evidence and is unaffected by error, despite possible insufficiency of evidence as to the remaining counts." *Tavaglione v. Billings*, 4 Cal.4th 1150. [Appendix (hereinafter "App.") B11]. Initially, the Court of Appeal upheld the entire judgment based solely upon the defamation cause of action. However, the jury made separate damage findings on each cause of action, and the separate damage finding on the defamation cause of action did not total all the compensatory damages awarded. The California Supreme Court, in its remand of this matter, held that the Court of Appeal "was required to review and uphold a sufficient number of separate damage findings which, when combined, equalled or exceeded the amount of the judgment." *Tavaglione v. Billings*, 4 Cal.4th at 1159. [App. B15].

On remand in November 1993, the California Court of Appeal upheld the defamation cause of action and the cause of action for breach of the implied covenant of good faith and fair dealing and affirmed the judgment in its entirety which together equalled or exceeded the amount of the judgment. Based upon the defamation cause of action, the Court of Appeal upheld compensatory damages of $604,787 along with the punitive damages of $2,430,000. In addition, and consistent with the directions of the California Supreme Court, the Court of Appeal upheld the remaining compensatory damages of $1,650,000 based on the cause of

action for breach of the implied covenant of good faith and fair dealing.

In upholding the defamation and breach of the implied covenant causes of action, the Court of Appeal found it unnecessary to review three causes of action for intentional interference with contractual relations, intentional interference with prospective economic advantage or negligent interference with prospective economic advantage.[2] The awards under these causes of action would have been sufficient to uphold the judgment.

In this Petition, defendants do not challenge the defamation cause of action, or the damages awarded thereunder. Out of a total award of $4.9 million, defendants' Petition addresses only the breach of the implied covenant cause of action and the $1,650,000 awarded thereunder. The issues presented are not substantiated by the record and are frivolous.

Defendants' Petition attempts to reargue the evidence and misstates the record in the process. Granting of a writ of certiorari is not warranted merely to review the evidence in the lower court's decision. *General Talking Pictures Corp. v. Western Electric Company*, 304 U.S. 175, 178, 58 S.Ct. 849, 851 (1938); *National Labor Relations Board v. Pittsburgh S. S. Co.*, 340 U.S. 498, 503, 71 S.Ct. 453, 456

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[2]The Court of Appeal, in *dicta*, expressed doubt concerning the validity of a cause for damages based upon illegal removal of a corporate director.

(1951). The Court of Appeal criticized the defendants' persistent attempts to reargue the evidence on appeal and stated that:

> In undertaking our review of the numerous and extensive issues raised by defendants in this appeal, we initially were struck by defendants' apparent inability to appreciate that a jury might view the various allegations of plaintiff's complaint and the evidence pertinent thereto in a manner adverse to defendants. In the trial court, defendants adhered steadfastly to the position that defendants' actions, in all respects, were proper. The jury, as evidenced by its verdict, obviously reached a different conclusion, as did the trial court, as evidenced by its denial of defendants' post-trial motions. Although defendants' trial court stance arguably could be characterized as advocacy, we do not fully comprehend defendants' adherence to that stance in this appeal. In other words, despite, what in our view, was an unequivocal message from the jury, defendants on appeal not only persist in their trial court assertions, but now also blame the trial court for their apparent lack of success. [App. A79-A80].

Defendants continue to attack the jury's findings even though the Court of Appeal held that they were supported by substantial evidence.

Defendants not only reargue the evidence, but make several material misstatements of the record. Thus, defendants, state that the "evidence is undisputed that the Bank was aware that plaintiff was no longer credit worthy, and posed a severe risk to the Bank's financial stability. . ." [Petition at p. 22].[3]

The record demonstrated that plaintiff repaid (and indeed overpaid) every loan ever owed to the Bank [App. A35-A36]. All of the Bank's directors testified, at trial, that they believed plaintiff was credit worthy, that his loans were well secured and that he did not pose a financial risk to the Bank [RT 692-697, 984, 254, 1020 and 2198]. The directors were not concerned over plaintiff's loans or his ability to repay them,[4] and plaintiff's loans had never been

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[3]As sole support for this remarkable statement, defendants cite to a single page of testimony where defendant Billings testified that one of plaintiff's tenants had filed bankruptcy and that rent payments to the plaintiff were delayed. This testimony was of marginal relevancy and the property at issue did not involve any of plaintiff's loans with the Bank [RT at 1593].

[4]The following is one example of the extensive testimony on this point:

Q. . . . Did you have concern that he would not be able to repay his loans?

A. No.

[RT 687 (24-26)].

discussed by the board prior to his removal in February.[5] The Court of Appeal found that substantial evidence supported the finding that plaintiff was current on all of his loans until January 1987, when the one loan was not renewed [App. A34-A36]. Thus, there was substantial evidence that plaintiff was not a deadbeat nor a financial risk to the Bank. The jury rejected defendants' argument then, and the Court of Appeal held that the jury's findings were well supported.

The Petition also repeatedly challenges both the California Supreme Court, and the Court of Appeal, in their holdings that the complaint involves separate causes of action rather than one unified cause of action. The Petition wrongfully states that all of the causes of action were

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[5]See, e.g.:

> Q. You do not recall ever coming to a loan committee meeting during that time, that's prior to January 1987, at which Mr. Tavaglione's loans were discussed and any concerns by Mr. Billings or any other loan committee member were raised concerning the defaults or Mr. Tavaglione's ability to repay those loans?
>
> A. I can't recall.
>
> * * *
>
> A. Well, we talked about defaults from time to time. And I just can't pinpoint one with Nick.
>
> Q. So I mean nothing stands out in your mind before 1987 concerning Mr. Tavaglione's loans?
>
> A. Not that I can recall.
>
> Q. And if something had been brought up at a loan committee meeting concerning Mr. Tavaglione's defaults, that would have been reflected in the minutes as far as you are aware?
>
> A. Yes.

[RT 690(15)-691(16)].

dependent upon the cause of action for illegal removal. This incredible statement is simply not supported by any record citations. There were several causes of action alleged in the complaint and proven at trial. The defamation cause of action is not factually or legally dependent upon plaintiff's cause of action for wrongful removal.[6] The cause of action for breach of the implied covenant of good faith and fair dealing was based upon the failure to renew a loan. The California Supreme Court specifically found that there were separate causes of action alleged in the complaint:

> Indeed, as a matter of logic, it would seem unlikely that plaintiff's damages from being defamed by defendants would be identical to the damages he incurred from being ousted from RNB's board of directors. Unlike the cases cited by plaintiff (citation omitted), these theories of recovery seem based on different 'primary' rights and duties of the parties. 4 Cal.4th at 1158. [App. B13].

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[6]Plaintiff sued defendants for falsely publishing defamatory statements that plaintiff had repeated defaults on three separate loans totalling $714,000 and defamatory statements that plaintiff had violated banking and securities laws [JA 171-202]. There was substantial evidence to support the jury's verdict. The court held that the evidence demonstrated that plaintiff was not in default on these loans as published, noting, among other evidence, that defendants were forced to repay plaintiff as a result of his *overpayments* on his loans [App. A34-A36]. The Court of Appeal found it unnecessary to review the defamatory statements by the defendants accusing plaintiff of violating banking and securities laws [App. A31].

In its decision, the California Supreme Court specifically found that the "plaintiff sued defendants on several different causes of action." 4 Cal.4th at 1152. [App. B4].

The Petition's rhetoric seeks to blur the divisions between the causes of action which were separate and distinct. While defendants devote much of their discussion in the body of the Petition to this issue, defendants do not show what relevance it has to the Questions Presented for Review.

ARGUMENT

I.

There Is No Jurisdiction Over the Questions Presented for Review and Defendants Have Failed to Preserve Any Claim of Error.

A. Defendants Have Failed to Raise a Federal Question Meriting Review.

Absent a federal issue, the Supreme Court has no jurisdiction to review the state court judgment. *Cardinale v. Lousiana, supra.* The federal question must have been raised and decided in the state court below. *Id.* In an effort to boot-strap jurisdiction, defendants argue that jurisdiction exists under the Fourteenth Amendment and the Supremacy Clause. The judgment below does not raise a legitimate federal question meriting review.

In addition, United States Supreme Court Rule 10 provides that certiorari is a matter of judicial discretion to be granted only where there are "special and important reasons

therefore." No special and important reasons exist in this case. The Opinion in question was rendered by a California Court of Appeal in an unpublished decision. Petitioners have not raised any arguments concerning the validity of the defamation cause of action. The implied covenant cause of action was determined by the Court of Appeal under California law. The California Supreme Court in denying review found that this case did not involve settlement of an important question of law as required under California Rule of Court 29(a)(i).

Certiorari is appropriate and should be granted only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal." *NLRB v. Pittsburgh S. S. Co.*, 340 U.S. 498, 502, 715 S. Ct. 453, 456 (1951). The United States Supreme Court does not sit to satisfy a scholarly interest in issues and does not sit for the benefit of the particular litigants. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 616 (1955). The questions presented by defendants do not merit review.

B. Defendants Have Failed to Preserve this Issue for Appeal.

Defendants have failed to demonstrate that this Court has jurisdiction under *Cardinale v. Lousiana, supra*. The United States Supreme Court Rule 14.1(h) states as follows:

> If review of a judgment of a state court is sought, the Statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon . . . are voluminous they shall be included in the appendix . . .

The Petition fails to comply with Rule 14 and fails to set forth the point at which the federal question was raised, the method or manner of raising them, and the way they were passed upon by those courts. The omission is intentional because defendants failed to raise these issues in the proceedings below.[7]

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[7]Defendants have consistently failed to include appropriate citations to the record demonstrating that they preserved issues for appeal. The California Court of Appeal held that defendants had waived many alleged claims of error.

Consistent with the appellate practice before the California Courts, defendants, in this Petition, have failed to note the manner in which the federal issues now being asserted were preserved for appeal. Defendants contend that they were denied due process by the trial court's judgment on the implied covenant cause of action. There is no citation to the record that this was raised before the Court of Appeal or the California Supreme Court. Indeed, in asserting 22 issues on appeal, defendants failed to include an argument that the judgment violated due process.

> We are able further to reduce the issues we must address in this appeal by noting defendants' near-total failure to demonstrate that the issues asserted in this appeal were, where necessary, first raised by defendants in the trial court and therefore preserved for review on appeal. . . .[D]efendants' claims of error must include appropriate citations to the record showing where the purported error occurred, and if appropriate, that defendants objected to that error in the proceeding below. 'An appellate court is not required to search the record to determine whether or not [it] supports appellants' claim of error. It is the duty of counsel to refer the reviewing court to the portions of the record which support appellants' position.' [Citation omitted.] Defendants, by failing in their opening and reply briefs to provide anything other than cursory citations to the joint appendix in lieu of clerk's transcript or to the reporter's transcript, have failed, almost without exception, to demonstrate error occurred in the trial court . . . Whatever the possible explanation, defendants generally have not met their burden of demonstrating error in the lower court proceeding [App. A19-A21].

Justice Mosk of the California Supreme Court also noted defendants' repeated failure to preserve issues for appeal. 4 Cal.4th at 1160-1161. [App. B16-B18].

Similarly, defendants never raised an issue of preemption in either the trial court, the Court of Appeal or in its petitions to the California Supreme Court. Defendants, for the first time, raise this issue in their Petition.

Finally, although defendants do not raise an issue in the Questions Presented for Review relating the jury instructions at trial, the body of the Petition contains references to supposedly erroneous jury instructions. These "objections" have been waived.

Under California law, each party must propose complete and comprehensive jury instructions in accordance with its own theory of the case. *See, Downing v. Barrett Mobile Home Transport, Inc.*, 38 Cal.App.3d 519 (1974). When the jury has not been instructed on a particular issue, even where that issue is fundamental to a prompt review of the case, no claim of error will be entertained unless the complaining party requested an instruction on a particular issue. *See, Wickham v. Southland Corp.*, 168 Cal.App.3d 49 (1985); *In re Estate of Martin*, 270 Cal.App.2d 506 (1969); *Bertero v. National Gen. Corp.*, 13 Cal.3d 43, 59 (1974).

Where a challenged instruction presents an incomplete statement of the law, any error will be deemed waived unless an objection to the instruction has been entered. *See, Downing v. Barrett Mobile Home Transport, Inc., supra; Redevelopment Agency v. First Christian Church of Long Beach*, 140 Cal.App.3d 690 (1983); *Delia S. v. Torres*, 134 Cal.App.3d 471, 481 (1982). In order to preserve its

objection, the party who complains that the instruction is too general, lacks clarity or is incomplete "must [also] request the additional or qualifying instruction in order to have the error reviewed." *Dorsic v. Kurtin*, 19 Cal.App.3d 226, 239 (1971). Under the doctrine of invited error, an appellant will not be heard to complain on appeal if he proposed the legally incorrect instruction or one substantially similar thereto. 9 *Witkin*, California Procedure, Appeal, Section 301 (3d ed. 1985).

Although defendants claim that they filed an appropriate objection to the jury instructions, in fact, no objections were made before the trial court. Defendants have conveniently omitted from their Appendix any record substantiating these objections. Further, defendants have failed to show how the challenge to a particular instruction was raised before the California Court of Appeal or how that specific instruction constituted prejudicial error. *See, LeMons v. The Regents of the University of California*, 21 Cal.3d 869 (1978), *See, also* App. A19-A21. In fact, no claim of error on the jury instructions was properly raised before the Court of Appeal. Finally, and as discussed below, any suggestion in the Petition that the jury instruction modeled upon 12 U.S.C. § 375b was incomplete or otherwise in error was waived under the doctrine of invited error. Perhaps most significantly, however, defendants have not raised an issue in the Questions Presented for Review which relates to any of the jury instructions.

II.

There Is No Basis For Review Of Plaintiff's Cause of Action For Breach Of The Implied Covenant Of Good Faith And Fair Dealing.

Petitioner's due process argument is based upon the argument that the Court of Appeal created "out of thin air an absolute duty on the part of the Bank to renew the plaintiff's overdue loans" pursuant to an "implied" or "oral" contract." [Petition, p.3]. This misstates the court's ruling. The Court of Appeal held that the evidence presented at trial was "sufficient to establish either an oral agreement or an agreement implied from [defendant] Billings conduct that defendants, at the very least, would not refuse unreasonably to renew or extend plaintiff's outstanding loans . . ." (Emphasis added.) [App. A42-A43].

No absolute duty was imposed upon defendants. Extensive evidence established an "implied contract between plaintiff and defendants which created a duty on the part of defendants to act in good faith and deal fairly with plaintiff in connection with renewing plaintiff's loans." [App. A41-A44]. This merely required defendants to act reasonably.

The Bank refused to renew plaintiff's loan in January 1987. Plaintiff was current on his loans at the time of the renewal in January 1987 [App. A35-A36]. At this time the Bank directors uniformly believed that plaintiff's loans were well secured and posed no more than a normal risk of

repayment [RT 692-695, 984, 254 and 2198].[8] The jury found that the renewal did not pose a more than normal risk of repayment [JA 1641].

Defendants' statements that the Court of Appeal's opinion created an absolute duty to renew an unsafe loan is a material misstatement of the record. The jury made a finding that the loan was not unsafe. At defendants request, the trial court instructed the jury on the provisions of 12 U.S.C. § 375b, as follows:

> A national bank may not loan money to any of its directors unless loans are made on substantially the same terms as those prevailing at the time for comparable transactions with other persons and do not involve more than the normal risk of repayment or present other unfavorable features [JA 1641].

The jury found that the loan was not unsafe and did not present a more than normal risk of repayment. This finding

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[8]The loan in question was one of a series of short-term (i.e., three- to six-month) loans, each of which had been repeatedly renewed by the Bank. The evidence at trial [See, generally, App. A11-A13, A42-A45] demonstrated that, the Bank notified plaintiff only several weeks after the loan came due, that it would refuse to renew the loan. The Bank, having failed to notify plaintiff of its sudden decision not to renew the loan, also refused to allow him 30 days to pay it off, and instead declared the loan in default. It was proven that the non-renewal was for the purpose of triggering the bylaw so as to expel plaintiff from the board. Stated differently, plaintiff demonstrated that the Bank's handling of his loans was not based upon his credit.

has never been challenged on appeal. Again, defendants simply fail to appreciate that the jury has already considered and rejected the arguments presented by Petitioners.

A. Defendants had "Fair Notice" of Plaintiff's Claims.

Defendants contend that they had no notice of this cause of action and that the judgment therefore violates the Fourteenth Amendment's guarantee of due process. This Court has held that a defendant must be given only "fair notice" of the plaintiff's claims. *New Motor Vehicle Board of the State of California v. Orrin W. Fox Company*, 439 U.S. 96, 125, n. 29 (1978); *Conley v. Gibson*, 355 U.S. 41 (1957) (only a short and plain notice of the claim is required); *See*, F.R.C.P. Rule 8.

In *Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 466 (9th Cir. 1990), the court held that the complaint gave defendants proper notice on a claim for unfair competition even though there was no cause of action pled where the prayer contained a demand for relief for unfair competition. *See also, Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 714 (8th Cir. 1979). The courts have long held that a defendant is given sufficient due process notice by the mere introduction of evidence at trial thereby allowing amendments to conform to proof. *See* F.R.C.P. Rule 15(b); *Frangos v. Doering Equipment Corp.*, 860 F.2d 70, 74 (1988); *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1522 (9th Cir. 1985) ("[I]ssues actually tried by the

consent of the parties are treated in all respects as if they had been raised in the pleadings.") Thus, the introduction of evidence alone constitutes sufficient constitutional notice of a claim.

Here, the complaint clearly stated a cause of action for breach of the implied covenant of good faith and fair dealing and the cause of action was so labeled [App. A40-A41, H1-H33]. Defendants had clear and specific notice of the claim. Petitioners' argument that no cause of action was pled was rejected by the Court of Appeal, which cited the allegation in plaintiff's complaint that defendants "held a duty to plaintiff to deal fairly and in good faith with plaintiff in connection with his loan transactions with the Bank." [App. A41].

Despite Petitioner's shocking assertion that notice of this claim was first given in the Court of Appeal's Opinion, the record on appeal highlights the fact that defendants not only had notice of this claim, but actively litigated it at trial. Defendants admit that evidence was admitted at trial on plaintiff's loan and the basis for the Bank's refusal to renew [Petition at p. 26: "certain evidence of the parties' course of conduct with respect to loans made to plaintiff was received"]. The jury was instructed on issues concerning the implied covenant claim [*see e.g.*, JA 1641, 1644, 1673-1682], including specific instructions on the renewal of the loan. Defendants submitted extensive evidence justifying the refusal to renew, including expert testimony. The California Court of Appeal held that any lack of specificity in the

complaint was cured by the evidence presented at trial [App. A40-A41], and the court and held that it "rejected[ed] defendants' assertion that there was no evidence presented at trial to show defendants had an obligation to renew or extend plaintiff's loans" [App. A43]. Defendants had notice of this claim in the complaint and it was clearly tried with defendants' consent. *Davis & Cox, supra.*

This is further documented by defendants' briefs in this appeal. In their Petition for Review to the California Supreme Court, defendants state as follows:

> [Plaintiff] came up with a new theory <u>at the time of trial</u> . . . that he was not really in default, because the Bank had a duty to renew and extend his loans, and that, if the Bank had done so, he would have been current! (Emphasis added). [Petition at p.4].

Defendants thereby admit that this issue was tried with their consent.

Defendants other briefs in this appeal demonstrate that they had notice of this claim at trial.

> Incredibly, the plaintiff was successful in his claim, at trial, that the bank owed him a duty to renew his delinquent loans, despite there being no prior commitment by the bank that it would renew them. As shown at length in the appellant's opening brief, there is considerable authority establishing that no such duty is

owed by the bank [Appellant's Reply Brief, filed April 1991, at p.25].

In their Opening Brief, defendants argued to the Court of Appeal that:

> [T]he jury was authorized to find that, under the [implied] covenant, the bank was required to give advance notice of any intention to terminate loans to the plaintiff or refuse to renew them. The jury was also instructed that the bank may have breached its covenant of good faith and fair dealing if it did not renew plaintiff's loans for a reasonable period of time in order to allow plaintiff to find a substitute lender, or to obtain a term loan [Appellant's Opening Brief at p. 59].[9]

These are but a few of the numerous instances demonstrating that defendants had notice of this claim, and actively litigated it at trial. Defendants' arguments were simply rejected by a Riverside County jury, the trial court, the Court of Appeal and the California Supreme Court.

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[9]Thereafter, in their Reply Brief, defendants stated that:

> Incredibly, the plaintiff was successful in his claim, at trial, that the bank owed him a duty to renew his delinquent loans, despite there being no prior commitment by the bank that it would renew them. [Appellants' Reply Brief at p. 25 (April 1991)].

B. **This Decision Is Not Preempted by Federal Law.**

Petitioners have not cited any authority supporting their argument that the federal banking statutes preempt all state contract law, for the simple reason that no such authority exists. Under the Supremacy Clause, U.S. Constitution, Article VI, clause 2, "state laws that intervene with, or are contrary to the laws of congress, made in pursuance of the constitution are invalid." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476, 2481 (1991). National banks are subject to all state laws not in conflict with federal statutes. Anderson National Bank v. Luckett, 321 U. S. 233, 64 S. Ct. 599 (1944).

Here, the issue is simply moot because the jury at defendants' request was instructed on federal law. The jury was instructed on the provisions of 12 U.S.C. § 375b. Any alleged error in the instruction constitutes "invited error." Further, defendants failed to preserve this issue for appeal and it has been waived. *United States v. Spector*, 343 U.S. 169, 72 S.Ct. 591 (1952).

Based upon this instruction, the jury found that the loan, or its renewal, did not present more than a normal risk of repayment. Substantial evidence cited above showed that plaintiff was current on his loans and that the loans did not pose a risk to the Bank. In any event, defendants waived any claim that the jury's finding was not supported by substantial

evidence. Defendants have never challenged the sufficiency of the evidence on this finding.

In testing for preemption, "the critical question . . . is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Commission v. Federal Commission*, 476 U.S. 355, 369, 106 S.Ct. 1890 (1986). Express preemption exists where Congress has expressly stated its intent to supersede state law. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95-98 (1983). The statutes cited by Petitioners do not expressly state an intent to supersede state law.

The federal laws governing national banks do not preempt all state regulation of such banks, rather the operations of national banks are generally subject to state laws, which are displaced only where they "infringe the national banking laws or impose an undue burden on the performance of the banks functions." *Anderson National Bank v. Luckett*, 321 U.S. 233, 248, 64 S.Ct. 599, 607 (1944). State law is then preempted only to the extent it directly conflicts with the federal provisions. *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 281, 107 S.Ct. 683, 689 (1987).

The opinion does not directly conflict with the federal statute. The opinion held that the bank may not unreasonably refuse to renew a loan, where there is a contract, to renew the loan. The jury was instructed on the provisions of § 375b that the renewal could not present an unreasonable risk of

repayment to the Bank. The jury specifically found that renewing plaintiff's loan did not involve more than a normal risk of repayment. The opinion does not conflict with the federal statute.[10]

In *Mortier, supra*, the court found no conflict preemption between federal and state laws in connection with a permit allowing aerial spraying of pesticides. After the town refused the permit to allow the aerial spraying, plaintiff brought an action claiming that the town ordinance was preempted by state and federal law. Section 136t(b) of "FIFRA," the federal statute, stated that the administrator "shall cooperate with . . . any appropriate agency of any state or any political subdivision thereof, in carrying out the provisions of this act. . . ." This court reasoned that FIFRA implied a regulatory partnership between federal, state and local governments, and held that there was no preemption by virtue of an actual conflict.

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[10]National banks have traditionally been "governed in the daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws." *National Bank v. Commonwealth*, 76 U.S. 353, 362, 19 L.Ed 701 (1870); 30 Stan. L.Rev.1. Courts have routinely applied state contract law in cases involving national banks. See, e.g., *Wichita Eagle and Bekin Publishing Co., Inc. v. Pacific National Bank*, 493 F.2d 1285 (9th Cir. 1974); *Fowler v. Security First National Bank*, 146 Cal.App.2d 37, 303 P.2d 565 (1956); *Security First National Bank v. Rospaw*, 107 Cal.App.2d 220, 237 P.2d 76 (1951). Regulation of banking has been one of dual federal and state control since the passage of the First National Bank Act in 1863, and the "right to contract, collect debts, and acquire and transfer property are all based on state law." *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 985 (3rd Cir. 1980).

Defendants also assert 12 U.S.C. § 1818 as a bases for conflict. Section 1818 provided that if it is determined that a national bank is involved in unsafe or unsound conditions or practices, the board of directors shall notify the appropriate banking agency of this determination. There is no evidence that the board ever notified any agency that plaintiff had an unsafe loan. Defendants' contention that the judgment conflicts with § 1818 is not supported by the record and is without merit.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ a Certiorari be denied.

Respectfully submitted,

Dated: May 13, 1994 MILLER, BOYKO AND BELL

By:_____

Roy Morrow Bell
Fletcher W. Paddison
Raymond Pepper
Attorneys for Respondent
Nicholas E. Tavaglione

PROOF OF SERVICE BY MAIL

State of California

ss.

County of San Diego

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 550 West "B" Street, Suite 400, San Diego, California 92101; that on May 16, 1994, I served the within *Brief in Opposition to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D. C. 20543
(By Federal Express: Original and 40 copies)

Clerk, California Court of Appeal
Fourth Appellate District
Division Two
303 West Fifth Street
San Bernardino, California 92401

Clerk, Riverside Superior Court
Honorable John P. Carroll, Judge
County Courthouse
4050 Main Street
Riverside, California 92501

Clerk, Riverside Superior Court
Indio Branch
Honorable H. Morgan Dougherty, Judge
Department C
46-209 Oasis Street
Indio, California 92201

Superior Court Clerk
Riverside County
Post Office Box 431 -- Appeals
Riverside, California 92502

Roy G. Weatherup, Esq.
Rita Gunasekaran, Esq.
Haight, Brown & Bonesteel
1620 26th Street, Suite 4000 North
Post Office Box 680
Santa Monica, California 90406-0608
Attorneys for Petitioners

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of May, 1994, at San Diego, California.

_____
Linda D. Crowe

Supreme Court, U.S.
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No. 93-1640

In the Supreme Court of the United States

October Term, 1993

RIVERSIDE NATIONAL BANK, MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT, J. RICHARD SWARTZ, and ROY E. WHITEHEAD,

Petitioners,

v.

NICHOLAS E. TAVAGLIONE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HAIGHT, BROWN & BONESTEEL,
Roy G. Weatherup,* and
Rita Gunasekaran
1620 26th Street, Suite 4000 North
Post Office Box 680
Santa Monica, California 90406-0608
Telephone: (310) 449-6000

Attorneys for Petitioners, RIVERSIDE NATIONAL BANK, MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT, J. RICHARD SWARTZ, and ROY E. WHITEHEAD

*** Counsel of Record**

Westside Law Publishers • West Hollywood, California 90069 • (310) 273-2887

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EDITOR'S NOTE

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TABLE OF CONTENTS

Page

I.

Under California Law, Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing Are Separate and Distinct Legal Theories, and the Plaintiff Here Has Relied Only on the Latter Theory, Which Is Unsustainable. 2

II.

No Cause of Action of the Plaintiff Is in Any Way Independent of the Breach of the "Oral" or "Implied" Contract to Renew the Plaintiff's Loans, Which Contract the Court of Appeal Found to Exist. 6

III.

The Finding by the Court of Appeal of Breach of Contract on the Part of the Defendants Represented the First and Only Notice to the Defendants That They Could Be Held Liable on Such a Theory. . . . 7

IV.

The Defendants Properly Preserved Their Federal Issues at the Earliest Opportunity Available. 8

V.

This Case Is of Sufficient Public Importance to Warrant the Granting of a Writ of Certiorari. 9

VI.

Conclusion. 10

TABLE OF AUTHORITIES CITED

Cases **Page(s)**

Balfour, Guthrie & Company v. Gourmet Farms,
108 Cal.App.3d 181, 166 Cal.Rptr. 422 (1980) 3
Careau & Co. v. Security Pacific Business Credit, Inc.,
222 Cal.App.3d 1371, 222 Cal.Rptr. 387 (1990) . 2, 4
Davis & Cox v. Summa Corporation,
751 F.2d 1507 (9th Cir. 1985) 7
Foley v. Interactive Data Corporation,
47 Cal.3d 654, 254 Cal.Rptr. 211,
765 P.2d 373 (1988) 4
Frangos v. Doering Equipment Corporation,
860 F.2d 70 (3d Cir. 1988) 7
Gaffney v. Downey Savings & Loan Association,
200 Cal.App.3d 1154, 246 Cal.Rptr. 421 (1988) . . . 2
Oglala Sioux Tribe of Indians v. Andrus,
603 F.2d 707 (8th Cir. 1979) 8
Peterson Development Company v. Torrey Pines Bank,
233 Cal.App.3d 103, 284 Cal.Rptr. 367 (1991),
review denied (1991) 4, 5
Racine v. Laramie, Ltd. v. Department of Parks
and Recreation,
11 Cal.App.4th 1026, 14 Cal.Rptr.2d 335 (1992) 4, 5
Seaman's Direct Buying Service, Inc. v. Standard
Oil Company, 36 Cal.3d 752, 206 Cal.Rptr. 354,
686 P.2d 1158 (1984) 2-3
Self Directed Placement Corporation v. Control Data
Corporation, 908 F.2d 462 (9th Cir. 1990) 8
Witt v. Union Oil Company,
99 Cal.App.3d 435, 160 Cal.Rptr. 285 (1979) 3

Rules

Rules of the Supreme Court of the United States
rule 14.1(h) 8
rule 15.6 1

Other Authorities

1 Witkin, Summary of Cal. Law (8th ed. 1973) Contracts,
§580, p. 497 3

for the County of Riverside

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NICHOLAS E. TAVAGLIONE,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners, Riverside National Bank, Michael C. Billings, Maryann Archambault, J. Richard Swartz, and Roy E. Whitehead, defendants in the lower courts, submit this brief pursuant to rule 15.6 of the *Rules of the Supreme Court of the United States*, in response to the opposition brief filed by respondent Nicholas E. Tavaglione on or about May 16, 1994. It is respectfully urged that certiorari should be granted to resolve the important issues presented by the defendants. The opposition brief filed by plaintiff Nicholas E. Tavaglione presents a misleading and inaccurate view of the law and of the record.

I.

Under California Law, Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing Are Separate and Distinct Legal Theories, and the Plaintiff Here Has Relied Only on the Latter Theory, Which Is Unsustainable.

In his opposition brief, plaintiff Tavaglione has assumed in his argument that breach of contract and breach of the covenant of good faith and fair dealing are essentially the same thing. Therefore, he reasons, it is appropriate to uphold a judgment based on a contract theory, even though no such theory was ever pursued, where the plaintiff did sue for breach of the implied covenant of good faith and fair dealing. This argument is untenable.

Over the course of many years, California courts have developed the independent theory of breach of the covenant of good faith and fair dealing as a tort cause of action, which is related to, but separate from, any claim for breach of contract.

The covenant of good faith and fair dealing is read into contracts in order to protect the express promises of the contract. An implied covenant is simply "an implied in law term of the contract." *Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal.App.3d 1371, 1393, 222 Cal.Rptr. 387 (1990). Thus, a breach of the covenant "will always result in a breach of the contract, although a breach of a consensual (i.e., an express or implied in fact) contract term will not necessarily constitute a breach of the covenant." 222 Cal.App.3d at 1393-1394.

Far from imposing new obligations and corresponding benefits, the implied covenant simply "requires each of the contracting parties to refrain from doing anything to injure the right of the other to receive the benefits of the agreement." *Gaffney v. Downey Savings & Loan Association*, 200 Cal.App.3d 1154, 1171, 246 Cal.Rptr. 421 (1988); *Seaman's Direct Buying*

Service, Inc. v. Standard Oil Company, 36 Cal.3d 752, 768, 206 Cal.Rptr. 354, 686 P.2d 1158 (1984).

A court may not use the implied covenant of good faith and fair dealing as a pretext for inserting a new term into the contract. " 'A covenant will not be implied against express terms or to supply a term on a matter as to which a contract is intentionally silent.' (1 Witkin, Summary of Cal. Law (8th ed. 1973) Contracts, §580, p. 497.)" *Witt v. Union Oil Company*, 99 Cal.App.3d 435, 441, 160 Cal.Rptr. 285 (1979). In other words, "the duty to act in good faith does not alter the specific obligations of the parties under the contract." *Balfour, Guthrie & Company v. Gourmet Farms*, 108 Cal.App.3d 181, 190, 166 Cal.Rptr. 422 (1980). Therefore, "[a]cts in accord with the terms of one's contract cannot without more be equated with bad faith." 108 Cal.App.3d at 191.

In the present case, according to the operative pleading of the plaintiff, the supposed covenant of good faith and fair dealing arose from the relationship of the parties. In particular, the plaintiff contended that his status as a shareholder, as a borrower, and as a director of the Riverside National Bank resulted in the existence of an implied covenant. All three of these supposed grounds for the existence of the covenant have failed.

At trial, the plaintiff abandoned any contention that mere ownership of stock gave rise to a covenant of good faith and fair dealing. Since the relevant loan documents omitted any obligation to renew existing loans, and in light of the authorities cited above, it became impossible to rely on the plaintiff's status as a borrower as the source of a covenant of good faith and fair dealing. The plaintiff's status as a director was the main focus of the trial, but in light of the ultimate recognition by the California Court of Appeal that there is no cause of action for "wrongful ouster" of a director, no covenant of good faith and fair dealing may be implied from the plaintiff's status as a director. The plaintiff never even alleged, in his lengthy first amended com-

plaint, a document with numerous causes of action, that there was any contract between him and the Riverside National Bank.

In the absence of a contract there can, of course, be no breach of the covenant of good faith and fair dealing. *Peterson Development Company v. Torrey Pines Bank*, 233 Cal.App.3d 103, 116, 284 Cal.Rptr. 367 (1991), *review denied* (1991); *Careau & Company v. Security Pacific Business Credit, Inc.*, 222 Cal.App.3d 1371, 1393, 1401, 272 Cal.Rptr. 387 (1990). In *Foley v. Interactive Data Corporation*, 47 Cal.3d 654, 254 Cal.Rptr. 211, 765 P.2d 373 (1988), the California Supreme Court noted that the "covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, [and] not to protect some general public policy interest not directly tied to the contract's purposes." 47 Cal.3d at 690.

In *Racine v. Laramie, Ltd. v. Department of Parks and Recreation*, 11 Cal.App.4th 1026, 14 Cal.Rptr.2d 335 (1992), the Court of Appeal reversed a judgment of nearly $600,000.00, which was based upon the jury's finding that the defendant breached the implied covenant of good faith and fair dealing. The Court of Appeal also directed the trial court to enter judgment notwithstanding the verdict in favor of the defendant. 11 Cal.App.4th at 1035.

Several years after entering into a contract bearing many attributes of a long term lease, the plaintiff and the defendant in *Racine* commenced negotiating modifications to the contract. These negotiations occurred over a period of five years, and resulted in various drafts of proposed amendments to the contract. The plaintiff sued when the negotiations broke down, just as the plaintiff did here when his loans were not renewed. The plaintiff's position was that the defendant failed to negotiate in good faith, in violation of the covenant of good faith and fair dealing implied in the contract.

The Court of Appeal reversed the judgment because the contract did not *expressly obligate* the defendant to negotiate a

modification. 11 Cal.App.4th at 1031, 1032. The Court of Appeal added:

> "[The defendant's] commencement and continuance of negotiations over a long period of time had no effect upon this lack of obligation, and . . . its assumption of an arbitrary stance at some point in the negotiations cannot therefore be a breach of any contract term, including implied contract terms of good faith and fair dealing, even though such conduct might be found by a jury to be unreasonable, unfair, or otherwise bad faith negotiation tactics." 11 Cal.App.4th at 1031.

As is made clear in *Peterson Development Company v. Torrey Pines Bank*, 233 Cal.App.3d 103, 116, 284 Cal.Rptr. 367 (1991), a breach of contract and a breach of the implied covenant of good faith and fair dealing give rise to two completely separate causes of action. Moreover, no cause of action for breach of the implied covenant can exist in the absence of an "underlying contract." 233 Cal.App.3d at 116.

The lengthy trial in this case was devoted mainly to the "illegal ouster" theory, which is invalid as a matter of California law, as the Court of Appeal was ultimately forced to concede. Thus, no implied covenant of good faith and fair dealing could attach to the plaintiff's status as a director. The loan documents did not contain any term or condition that was violated by the Riverside National Bank, nor did they impose any obligation to renew loans or make new ones. Thus, the loan documents did not represent contracts to which the covenant of good faith and fair dealing could be attached. Thus, the Court of Appeal was forced to direct its attention to a different contract. It found that there had been an "oral" or "implied" contract to make or renew loans, a legal theory that never came up in the course of the present litigation until 1993, more than seven years after the commencement of the lawsuit and more than four years after the trial.

II.

No Cause of Action of the Plaintiff Is in Any Way Independent of the Breach of the "Oral" or "Implied" Contract to Renew the Plaintiff's Loans, Which Contract the Court of Appeal Found to Exist.

Without the newly discovered claim of breach of contract, the entire case of the plaintiff collapses like a house of cards. In his opposition brief in this court, the plaintiff persists in arguing that the defamation claims and other claims maintained by him are independent of the alleged "oral" or "implied" contract to renew the plaintiff's loans. Nothing could be further from the truth. If there was no "contract" to renew loans, then there was no contract to which the implied covenant of good faith and fair dealing could have attached. Unless there was a breach of the duty to renew loans, there was nothing defamatory in press reports that indicated that the plaintiff had been "ousted" as a director because of his failure to repay loans that were due. It is not libelous to describe a deadbeat as a deadbeat. Regardless of whether the plaintiff was current on his interest payments at various times, he had not repaid the principal of any loan at the time of the allegedly defamatory newspaper articles. If he was obligated to repay, pursuant to the loan documents, and had no automatic right to renewal, then he was in default, and the press coverage was truthful and accurate.

The remaining causes of action, not analyzed by the Court of Appeal, included interference with contractual relationships, interference with prospective economic advantage, and negligent interference with contractual relationships. All of these claims were dependent upon the validity of the "wrongful ouster" cause of action (which has been found to lack legal substance), or breach of the supposed contractual duty to renew loans. The clearest indication of the interdependence of the claims of the plaintiff is the operative first amended complaint. The first cause of action for "illegal ouster" is incorporated, in its entirety, in all of the subsequent subsidiary causes of action.

III.

The Finding by the Court of Appeal of Breach of Contract on the Part of the Defendants Represented the First and Only Notice to the Defendants That They Could Be Held Liable on Such a Theory.

As previously demonstrated, the breach of contract claim, upheld by the Court of Appeal although never even pleaded by the plaintiff, is essential to the entire case of the plaintiff, but is separate from the cause of action for breach of the implied covenant of good faith and fair dealing. Until the second Court of Appeal decision, the implied covenant was attached to the plaintiff's status as a director and to his loan documents. Since these theories failed, the Court of Appeal invented a new contract to which it attached the implied covenant. In the long history of the case, until the time of the ultimate appellate decision in California, no contract to renew loans had even been pleaded, much less proved.

In his opposition brief in this court, the plaintiff refers to certain selected passages in the prior appellate briefs of the defendants. These references to the claimed right of loan renewal all involve evidence and legal discussion pertaining to the "illegal ouster" and other claims, and do not relate to any contract theory. There was no contract theory in the case until the last Court of Appeal decision. There never was any contention on the part of the plaintiff that the Riverside National Bank had a legal obligation to renew the loans made to the plaintiff, which the plaintiff had been unable to repay.

The few cases cited by the plaintiff with respect to the notice issue are all easily distinguished. In *Frangos v. Doering Equipment Corporation*, 860 F.2d 70 (3d Cir. 1988), the defendant consented to the trial of a new legal theory and to an amendment at the trial court level of the pleadings of the adverse party. Similarly, in *Davis & Cox v. Summa Corporation*, 751 F.2d 1507 (9th Cir. 1985), the court relied upon the fact that the

parties may consent to the trial of an issue outside the pleadings, but noted that the trial judge must make a finding of such consent. In the present case, there was no consent on the part of the defendants to the trial of any contract claim against them, and the trial judge made no finding of such consent. Furthermore, the special verdict of the jury contained no finding on any contract theory, and it is therefore impossible to say that the contract liability discovered by the Court of Appeal in 1993 was actually tried in 1989.

In *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979), and in *Self Directed Placement Corporation v. Control Data Corporation*, 908 F.2d 462 (9th Cir. 1990), there were sufficient facts alleged to put the defendants on notice of the substance of the claims against them, so that they were able to prepare their defenses. In contrast, the defendants in the present case never received any notice whatsoever that they were alleged to have a legal obligation to renew the loans previously extended to a deadbeat director, an insider at the Riverside National Bank. The breach of contract theory never even entered the litigation until the second decision of the Court of Appeal in late 1993.

IV.

The Defendants Properly Preserved Their Federal Issues at the Earliest Opportunity Available.

In his opposition brief in this court (at pages 11-12), the plaintiff makes the incredible assertion that the defendants failed to comply with rule 14.1(h) of the *Rules of the Supreme Court of the United States*, by failing to point out how and in what manner the federal issues presented by defendants were preserved in the lower courts. This statement is plainly incorrect.

As noted above, the defendants first received notice of the supposed contract to renew loans at the time of the second Court of Appeal decision in late 1993. They raised the constitutional propriety of lack of notice of the claim at the earliest

possible opportunity, in their petition for rehearing in the Court of Appeal. A copy of the petition for rehearing is appendix G to the defendants' petition for a writ of certiorari, and the constitutional issue of notice is discussed at pages G2 through G5. Furthermore, the defendants had no opportunity to argue that the newly discovered contractual duty violated federal statutory law until the time of their petition for rehearing, when the argument was first made. (See appendix G, page 18.)

V.

This Case Is of Sufficient Public Importance to Warrant the Granting of a Writ of Certiorari.

In his opposition brief, the plaintiff argues that the present case is unimportant, and that certiorari should be denied for this reason, regardless of any merit in the legal contentions of the defendants. It is respectfully submitted that the plaintiff is wrong.

For decades, the decisions of this Court have upheld the constitutional requirement of notice as a prerequisite to imposition of financial liability on the part of a defendant. Here, there was no notice at all of the contract theory on which a massive judgment has now been upheld. The contract claim was never pleaded or proved, and defendants had no opportunity to respond to it. It was invoked at the eleventh hour, because of legal infirmity in the causes of action on which the plaintiff actually prevailed. The present judgment, with interest and attorneys' fees, now has a value of almost eight million dollars. This court should not permit a forfeiture of this magnitude, which is based upon a clear violation of the constitutional right of notice.

In addition to violating the Constitution, the contract claim, which is the foundation of the present judgment, violates federal banking law. A state has, in effect, imposed a legal duty to renew loans to an insider, a director who has been unable to pay his debts. After the trial, plaintiff's other creditors filed

massive liens, which exceeded even the multi-million dollar award in favor of the plaintiff.

Federally chartered banks are regulated in many areas, including procedures for making loans. If a state may impose a duty to make a loan, based solely on a contract implied from a course of conduct, or an alleged oral agreement, then the province of federal law is invaded. In this era of shaky financial institutions, insider deals of much smaller magnitude than the loans made to the plaintiff have attracted widespread public attention. If the present judgment stands, a bank will have been punished for refusing to renew loans to an insider, rather than for making insider loans. A federally chartered bank should not be punished for doing the right thing. The loans made to the plaintiff, a deadbeat director, should not have been renewed, and the Bank should not suffer for refusing to renew them.

Lender liability litigation is rampant in California. It is based primarily on the curious California cause of action known as breach of the implied covenant of good faith and fair dealing. Whatever the merits of the covenant theory in other cases, it cannot be properly invoked here, because there never was any breach of contract claim asserted in a manner consistent with the federal Constitution and with federal statutes regulating the banking industry.

VI.

Conclusion.

For the foregoing reasons, and for the reasons previously stated in defendants' petition in this court, it is respectfully submitted that certiorari should be granted. An eight million dollar liability, in violation of the federal Constitution as well as federal statutory law, must not be permitted to stand.

Respectfully submitted,

HAIGHT, BROWN & BONESTEEL,
Roy G. Weatherup, and
Rita Gunasekaran

Attorneys for Petitioners,
RIVERSIDE NATIONAL BANK, MICHAEL C. BILLINGS,
MARYANN ARCHAMBAULT, J. RICHARD SWARTZ, and
ROY E. WHITEHEAD

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on May 26, 1994, I served the within *Reply to Brief in Opposition to Petition For Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(*By Federal Express: Original and Forty Copies*)

Clerk, California Court
of Appeal
Fourth Appellate District
Division Two
303 West Fifth Street
San Bernardino, California
92401

Clerk of the Superior Court
for the County of Riverside
Honorable John P. Carroll, Judge
County Courthouse
4050 Main Street
Riverside, California 92501

Mr. Roy Morrow Bell
Mr. Fletcher W. Paddison
Miller, Boyko and Bell
550 West "B" Street, Suite 400
San Diego, CA 92101-3599
(*Attorneys for Plaintiff, Mr. Nicholas E. Tavaglione*)

Superior Court Clerk
Riverside County
Post Office Box 431 -- Appeals
Riverside, California 92502

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 26, 1994, Los Angeles, California.

David Soto
(Original Signed)

Tavaglione on or about May 16, 199- [illegible] respectfully urged